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No. 83-

Office-Supreme Court, U.S.
FILED
JUN 11 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

C.G. BILLMEYER, MELVIN MORGAN, F.W. "BILL" ROSKELLEY, JOHN EVANS, DONNA BOE, WAYNE ELLIS, and the CITY OF POCATELLO, an Idaho Municipal Corporation,

Petitioners,

v.

JOSEPH TOVAR and DEBORAH ANN MOORE,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The Court Of Appeals For The Ninth Circuit Erred In Refusing To Affirm The Dismissal Of Tovar And Moore's Civil Rights Action Which "Implicated An Important Interest" Of The City Of Pocatello (ie., Enforcement Of Its Zoning Ordinances).

2. (a) Whether Tovar And Moore's Civil Rights Complaint States A Claim Upon Which Relief Can Be Based Under The Civil Rights Statute, 42 U.S.C., §1983?

(b) Whether The Court Of Appeals For The Ninth Circuit Erred In Refusing To Affirm The District Court's Award Of Summary Judgment To The City Of Pocatello?

3. Whether The Refusal Of The Court Of Appeals For The Ninth Circuit To Affirm The Summary Judgment Awarded The City As To Tovar And Moore's Civil Rights Action, On Res Judicata Principles Under This Court's Decision In The Migra Case, Pursuant To The Two Idaho State Court Final Judgments Awarded The City In The State Lawsuits Brought By Tovar And Moore, Constitutes A Violation Of The Full Faith And Credit Provision Of The Federal Constitution (Art. IV, §1).

4. Whether The Bad Motivation Of A City Council In Enacting And Interpreting Legislation May Give Rise To A Federally Created Civil Right And Damages, Where: (1) Such Legislation Is Constitutional On Its Face, And (2) In State Court Proceedings Which Are Fair On Their Face, the City Council's Interpretation Is Held To Be Reasonable, And The Acts And Conduct Of The City Council In Such Matter Are Held Not To

Have Been Done Arbitrarily, Capriciously, Or With An Abuse Of Discretion.

SUBJECT INDEX

QUESTIONS PRESENTED

OPINIONS BELOW 3

JURISDICTION 4

STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 11

A. Background History 11

B. The Initial Controversy In The Idaho Court (Civil Action No. 34096). Tovar and Moore Elect To Proceed In The State Court System Under The Procedural Remedy Which The State Of Idaho Has Provided. (See Appendix "A".) 14

C. Tovar And Moore File A Duplicative Civil Rights Action In The U.S. District Court (Civ. 4-75-59), Alleging Both Constitutional Violations And Pendant State Claims. (See Appendix "B".) 16

D. In Idaho Civil Action No. 34096, The Idaho Trial Court Finds That The Defendants Have Not Acted Arbitrarily And That The Classification Of Theaters As "Amusement Enterprises" Was Not Unreasonable. 17

E. The U.S. District Court Abstains In The Federal Civil Rights Action No. 4-75-59. 18

F. Tovar And Moore File A Second Idaho State Court Action. (Civil Action No. 34739). (See Appendix "C".) 19

G. The Second State Court Action (Civil Action No. 34739) Is Dismissed. The State Trial Court Finds That The Same Issues Are Presently Pending In The First State Court Action (Civil Action No. 34096.) 20

H. The First State Court Action Is Dismissed (Civil Action No. 34096). Tovar And Moore Do Not Appeal That Final Judgment. 21

I. U.S. District Judge Callister Dismisses The Federal Civil Rights Action No. 4-75-59 On Abstention Grounds. 21

J. The Idaho Supreme Court Affirms The Judgment Of Dismissal In The Second State Court Action. (See Appendix "I".) 22

K. The Court Of Appeals Reverses The Dismissal Of The Civil Rights Action. (See Appendix "J".) 22

L. U.S. District Judge Callister Grants The Defendants' Motion for Summary Judgment. (See Appendix "G".) 22

M. The Court Of Appeals Reverses The Summary Judgment Awarded To The Defendants And Holds That The City Council's Motivation Presents A Litigable Issue. (See Appendix "K".) 23

N. Post Judgment Petition For Rehearing. 24

SUMMARY OF ARGUMENT 26

REASONS FOR GRANTING THE WRIT 27

I

UNDER THE PRINCIPLES ESPOUSED IN MIDDLESEX COUNTY ETHICS COMMITTEE V. GARDEN STATE BAR ASSOCIATION AND OTHER ABSTENTION CASES, THE NINTH CIRCUIT WAS REQUIRED TO ABSTAIN AND DISMISS THE CIVIL RIGHTS ACTION. 27

A. In Applying The Four Part Test Set Forth In Middlesex County Ethics Assn., The Federal Court Must Abstain If The First Three Parts Of The Test Are Satisfied And If The Statute Or Ordinance Is Susceptible Of A Constitutional Construction In The State Court. It May Only "Assume Jurisdiction" Where The Challenged Statute Is "Flagrantly And Patently Violative Of Express Constitutional Prohibitions In Every Clause, Sentence And Paragraph And In Whatever Manner And Against Whomever An Effort Might Be Made To Apply It". 34

II

TOVAR AND MOORE'S CIVIL RIGHTS ACTION FAILS TO STATE A CLAIM UPON WHICH FEDERAL RELIEF CAN BE BASED. BOTH THE DISTRICT COURT'S DISMISSAL AND SUMMARY JUDGMENT IN FAVOR OF THE CITY SHOULD HAVE BEEN SUSTAINED. 53

III

THE PRINCIPLES EXPRESSED IN THIS COURT'S JANUARY 23, 1984 DECISION IN MIGRA v. WARREN CITY SCHOOL DISTRICT BD. OF EDUCATION, ET AL., REQUIRE THE NINTH CIRCUIT TO ACCORD FULL FAITH AND CREDIT TO THE FINAL JUDGMENTS WHICH WERE ENTERED IN FAVOR OF THE PETITIONERS IN THE IDAHO STATE ACTIONS FILED BY TOVAR AND MOORE, AND TO DISMISS THEIR FEDERAL CIVIL RIGHTS COMPLAINT ON RES JUDICATA AND COLLATERAL ESTOPPEL PRINCIPLES. 57

IV

UNDER THE PRINCIPLES EXPRESSED BY THIS COURT IN DISTRICT OF COLUMBIA COURT OF APPEALS, ET AL. v. FELDMAN, ET AL., THE NINTH CIRCUIT LACKED JURISDICTION OVER THE SUBJECT MATTER TO INQUIRE INTO THE MOTIVATION OF THE CITY COUNCIL IN ENACTING ZONING LEGISLATION. 61

CONCLUSION 65

INDEX TO APPENDICES

APPENDIX

A State Court Petition To Review Denial Of Variance filed on December 9, 1975 in the District Court of the Sixth Judicial District of the State of Idaho, In and For the County of Bannock, entitled Deborah A. Moore, v. City of Pocatello, a Municipal Corporation of Idaho, by the City Council of said City, consisting of C.G. Billmeyer, Donna Boe, F.W. "Bill" Roskelley, Mel Morgan, John Evans, Les Purce, and Earl Pond, being Case No. 34096.

B Federal Court Civil Rights Complaint (42 U.S.C. §1983) filed on December 22, 1975, in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Civil Action CIV 4-75-59.

C State Court Complaint filed on August 5, 1976, in the District Court of the Sixth Judicial District of the State of Idaho, In and For The County of Bannock entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl

Pond; Grant Anderson; Robert Meline; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Case No. 34739.

D Response and Answer of City of Pocatello filed on or about April 15, 1980, in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Civil Action CIV-4-75-59.

E Defendants' Motion for Summary Judgment, filed on or about July 17, 1980 in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Civil Action CIV 4-75-59.

F Defendants' Concise Statement of Material Facts in Support of Motion for Summary Judgment filed on or about July 15, 1980, in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Civil Action CIV 4-75-59.

G Memorandum and Order of United States District Judge Marion J. Callister, filed on or about April 15, 1982, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation; being Civil Action Civ 4-75-59.

H Trial Judgment filed on or about April 15, 1982 in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation; being Civil Action Civ 4-75-59.

I Opinion of Supreme Court of Idaho in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Grant Anderson, Robert Meline, Wayne Ellis, and the City of Pocatello, an Idaho Municipal Corporation, No. 12556, 98 Idaho 891, 575 P.2d 489(Feb. 28, 1978).

J Opinion of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Grant Anderson, Robert Meline, Wayne Ellis, and the City of Pocatello, an Idaho Municipal Corporation, No. 77-2929, 609 F.2d 1291 (9th Cir., Nov. 6, 1979).

K Opinion of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Donna Boe; Wayne Ellis; and The City of Pocatello, an Idaho Municipal Corporation, No. 82-3258, 721 F.2d 1260 (9th Cir., Dec. 15, 1983).

L Judgment of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Donna Boe; Wayne Ellis; and The City of Pocatello, an Idaho Municipal Corporation, No. 82-3258 (DC CV 4-75-59 MJC), filed and entered Dec. 15, 1983.

M-1 Petitioners' "SUGGESTION FOR EN BANC CONSIDERATION", filed on or about Dec. 22, 1983.

M-2 Petitioners' "SUPPLEMENTAL SUGGESTION, PETITION FOR REHEARING, and REQUEST FOR HEARING EN BANC", filed on or about Jan. 31, 1984.

M-3 Petitioners' "Motion To Enlarge The Time For Filing And To Late File The SUPPLEMENTAL SUGGESTION, PETITION FOR REHEARING, and REQUEST FOR HEARING EN BANC", filed on or about Feb. 3, 1983.

N Order of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Donna Boe; Wayne Ellis; and The City of

Pocatello, an Idaho Municipal Corporation, No. 82-3258, filed Feb. 7, 1984, that a majority of the panel had voted to reject the suggestion for rehearing en banc.

O Order of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskeller (sic); John Evans; Donna Roe (sic); Wayne Ellis; and The City of Pocatello, an Idaho Municipal Corporation, No. 82-3258, filed Feb. 21, 1984, denying Appellees' Motion To Enlarge The Time for Filing And To Late File The Supplemental Suggestion, Petition for Rehearing, and Request For Hearing En Banc.

P United States Constitution
First Amendment
Fourteenth Amendment
Article IV, §1

United States Code
28 U.S.C., §1738
42 U.S.C., §1983

Federal Rules of Appellate Procedure
Rule 35
Rule 40

Idaho Code
§67-6519
§67-5215
§67-5216

TABLE OF AUTHORITIES

CASES

Aldridge, et al. v. Williams, 3 How. 44 U.S. 9, 11 L.Ed. 469 (1845). 62

Allen v. McCurry, 449 U.S. 90 (Dec. 9, 1980). 37, 38, 39, 53, 60

Berman v. Parker, 348 U.S. 26 (1954). 30

Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976). 33

District of Columbia Court of Appeal v. Feldman, et al., ___ U.S. ___, 75 L.Ed.2d 206 at 225 (Mar. 23, 1983). 33, 61, 63

Dombrowski v. Pfister, 380 U.S. 479 at 490 49, 50, 52

Ebel v. City of Corona, 698 F.2d 390 (9th Cir., 1983). 10, 24, 61, 62

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct. 461 (1964). 7

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). 34, 35, 36, 37, 40

Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363. 1

Juidice v. Vail, 430 U.S. 327 (Mar. 22, 1977). 35

Juncker v. Tinney III, 549 F.Supp. 574. 54

Martinez v. California, 444 U.S. 277 (1980). 54

Mercer v. Theriot, 377 U.S. 152 1

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). 46, 47, 48, 49, 50

Middlesex County Ethics Committee, etc. v. Garden State Bar Assn., et al., 457 U.S. 423 (June 21, 1982). 27, 28, 29, 31, 33, 34, 40, 41, 43, 44, 51

Migra v. Warren City School District Board of Education, et al., ___ U.S. ___, 79 L.Ed.2d 56 at 64, fn. 7, 104 S.Ct. ___ (Jan. 23, 1984). 7, 9, 24, 57, 58, 59, 60

Moore v. Sims, 442 U.S. 415 (June 11, 1979) 36

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977). 34, 43

Parratt v. Taylor, 451 U.S. 527 (1981). 53, 54, 55

People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 44, 45

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). 35, 37

Reese v. Georgia, 350 U.S. 85 1

Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975). 57, 59

Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir., 1980), affirmed, 102 S.Ct. 557 (1981). 48, 49, 50, 51

Stecher v. Askew, 432 F.Supp. 997 (1977). 41, 42

Tilton v. Richardson, 403 U.S. 672 46

Tovar v. Billmeyer, 98 Idaho 891. 7, 22, 58, 59

Tovar v. Billmeyer, 609 F.2d 1291 22

Tovar v. Billmeyer, 721 F.2d 1260 10, 23

Trainor v. Hernandez, 431 U.S. 434 (May 31, 1977). 35, 36, 37

U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971). 44, 45

U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). 43

Urie v. Thompson, 337 U.S. 163 1

Vickory v. Walton, 721 F.2d 1062 (CA 6th, Nov. 30, 1983). 55, 56

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). 30

Young v. American Mini Theaters, 427 U.S. 50 (1976). 31

Younger v. Harris, 401 U.S. 37 (1971). 27, 35, 37, 40

STATUTES, ETC.

U.S. Constitution, Article IV, §1 8

28 U.S.C. §1254(1) 5

28 U.S.C. §1738 9

42 U.S.C. §1983 7, 9, 19, 37, 38 53, 55, 56, 58

Federal Rules of Appellate Procedure, Rule 35 64

Federal Rules of Appellate Procedure, Rule 40 63

Idaho State Constitution Article V, §1 6

Idaho Code §67-5215 6, 14

Idaho Code §67-5216 6, 15

Idaho Code §67-6519 6, 14

TEXTS

Los Angeles Daily Law Journal, November 19, 1982. 52

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Stern and Gressman, Supreme Court Practice (5th Ed.). 1, 65

Sutherland, Statutory Construction, Vol. 2A, §48.17. 62

- No. 83-

In the
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C.G. BILLMEYER, MELVIN MORGAN, F.W. "BILL" ROSKELLEY, JOHN EVANS, DONNA BOE, WAYNE ELLIS, and the CITY OF POCATELLO, an Idaho Municipal Corporation,

Petitioners,

v.

JOSEPH TOVAR and DEBORAH ANN MOORE,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari be issued to review both[1/]: (1) the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, Melvin Morgan, F.W.

1/ See Supreme Court Practice, Fifth Edition, by Stern and Gressman at pg. 403, citing Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365, fn. 1; Urie v. Thompson, 337 U.S. 163, 171-173; Reese v. Georgia, 350 U.S. 85, 87; Mercer v. Theriot, 377 U.S. 152, 153-154.

"Bill" Roskelley, John Evans, Donna Boe, Wayne Ellis, and the City of Pocatello, an Idaho Municipal Corporation, C.A. No. 82-3258, which sustained the Plaintiffs' appeal from the trial court's Judgment and Memorandum and Order of April 15, 1982, granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment; and (2) the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in Joseph Tovar and Deborah Ann Moore, v. C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Wayne Ellis, and the City of Pocatello, an Idaho Municipal Corporation, C.A. No. 77-2929, which sustained the Plaintiffs' appeal from the trial court's Judgment and Memorandum and Order of June 7, 1977, granting Defendants' motion to dismiss the civil rights complaint on abstention grounds.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, et al., C.A. No. 82-3258, is reported in 721 F.2d 1260 (Dec. 15, 1983). A copy of the opinion and judgment appears in this Petition at Appendix K and L. A copy of the Memorandum and Order, and Judgment of United States District Judge Marion J. Callister in the same case (Civil Action Civ. 4-75-59), filed on April 15, 1982, appears in this Petition at Appendix G and H.

The opinion of the United States Court of Appeals for the Ninth Circuit in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, et al., C.A. No. 77-2929 is reported in 609 F.2d 1291 (Nov. 6, 1979) and appears in this Petition at Appendix J.

The opinion of the Idaho Supreme Court in Joseph Tovar and Deborah Ann Moore v.

C.G. Billmeyer, et al., Civil No. 12556 (Idaho District Court Case No. 34739) is reported in 98 Idaho 891 and appears in this Petition at Appendix I.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, et al., C.A. 82-3258 was filed on December 15, 1983.

On December 22, 1983, Petitioners filed a "Suggestion for En Banc Consideration". On January 31, 1984, Petitioners filed a "Supplemental Suggestion, Petition for Rehearing, and Request for Hearing En Banc". On February 3, 1984, Petitioners filed a "Motion To Enlarge the Time For Filing And To Late File the Supplemental Suggestion, Petition for Rehearing, and Request for Hearing En Banc". A copy of said pleadings appears herein at Appendix M. A copy of the orders of the Court of Appeals thereon, filed on February 7, and February 21, 1984,

appears at Appendix N and O.

On May 4, 1984, Associate Justice W. H. Rehnquist signed an order extending the time for filing a petition for certiorari to and including June 11, 1984, without prejudice to the Court's later consideration of whether the time for filing the petition for certiorari runs from the order of the United States Court of Appeals for the Ninth Circuit on February 7, 1984 or from the opinion and judgment of the United States Court of Appeals for the Ninth Circuit on December 15, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the following statutes, ordinances, and constitutional provisions are set forth at Appendix P:

U.S. Const., 1st Amend., 14th Amend., Art. IV, §1; 28 U.S.C. § 1738, 42 U.S.C. § 1983; F.R.A.P. 35, F.R.A.P. 40; Idaho Code § 67-6519, § 67-5215 and

§ 67-5216.

STATEMENT OF THE CASE

Petitioners contend that the Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") has unlawfully interfered with the City of Pocatello's right to adjudicate an important state interest[2/] in accordance with state law and state judicial procedures.

The Idaho statutes (Idaho Code §§ 67-6519, 67-5215 and 67-5216) provide a specific procedural remedy for resolving zoning disputes. In addition to requiring the filing of a claim, the State of Idaho exercises judicial economy by preventing the splitting of causes of action under the state's "single controversy doctrine" (Article V, § 1. Idaho State Constitution) and its rule of law which instructs a party that if he fails to join his causes of

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2/ Ie., a zoning interest arising out of enforcement of a zoning ordinance which was enacted pursuant to an Idaho enabling statute. See text at page 30 et seq.

action, he proceeds at his peril because a "judgment is conclusive as between the parties and their privies on all issues which were (or should have been) litigated in the action." (our emphasis.) Tovar v. Billmeyer, 98 Idaho 891.

Initially, Tovar and Moore elected to proceed with a lawsuit in the State Court system [3/] under the specific procedural remedy the State of Idaho has provided. Thereafter, in the two appeals noted above, C.A. No. 77-2929 and C.A. No. 82-3258, the Ninth Circuit permitted Tovar and Moore to frustrate the above described state policies by assuming federal jurisdiction under the guise of a civil rights violation (42 U.S.C. § 1983), and against the City of Pocatello's claim that federal jurisdiction did not lie

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3/ This is not a case which is controlled by England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct. 461 (1964). See Associate Justice Blackmun's opinion in Migra v. Warren City School District Board of Education, et al., ___ U.S. ___, 79 L.Ed.2d 56 at 64, fn. 7, 104 S.Ct. ___ (Jan. 23, 1984).

because of: (1) failure to state a claim upon which relief can be based; (2) lack of federal jurisdiction; (3) abstention, and (4) election of remedies. In both appeals, the U.S. District Court had rendered judgment in favor of the City's claims.

As a result of such federal interference the City, in 8 1/2 years of litigation, has been required to undertake the burden of two federal trials and appeals therefrom, in addition to the two state lawsuits it has successfully defended and prosecuted to final judgments. In addition, the City faces a third federal lawsuit if this petition for certiorari is unsuccessful.

After the City of Pocatello had prevailed on the merits in both state lawsuits, the Ninth Circuit refused to accord full faith and credit to the final judgments which were entered in such state litigation, in violation of Article IV, § 1 of the U.S. Constitution, as implemented by

the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738.[4/] That statute reads in pertinent part:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Petitioners herein contend that such refusal is contrary to this Court's recent judgment in Migra v. Warren City School District Board of Education, et al., ___ U.S. ___, 79 L.Ed.2d 56 (Jan. 23, 1984), which hold that a final judgment of a state court has the same preclusive effect as to a federal issue in a federal court § 1983 action that the § 1983 litigant could have raised but did not raise in the earlier state court proceeding.

In arriving at a contrary result, the

[4/] The final judgment in Idaho Civil Action 34096 was the City Council had not acted arbitrarily and the classification of theaters as "amusement enterprises" was not unreasonable. See Statement of Facts, infra, at page 17. See also Appendix I-12, et seq.

Ninth Circuit applied a rule of law newly expressed in Ebel v. City of Corona, 698 F.2d 390, 392 (9th Cir., 1983) which was neither briefed nor argued by the parties, that, notwithstanding the City's zoning ordinance was constitutional on its face, the enactment of the same could give rise to a federally created right if the "motivation" of the City Councilmen was bad. Tovar v. Billmeyer, 721 F.2d 1260 at 1265, fn. 5, appearing herein at Appendix K-19. See Point IV, infra, at page 61.

Petitioners contend that the questions herein are important and should be resolved because they present problems which are plaguing municipal government at the present time. See, for example, the zoning cases cited in Tovar, et al. v. Billmeyer, et al., 721 F.2d 1260 at 1264 et seq., which appears herein at Appendix K-11 et seq.

STATEMENT OF FACTS

A. Background History

May 19, 1972 - August 31, 1975: Joseph Tovar and Deborah Ann Moore [5/] leased and operated an adult bookstore and motion picture theater at 135 South Main in a Commercial Central Zone. According to the statement of Tovar's counsel on December 5, 1980, such land use was pursuant to a conditional use permit issued May 19, 1972.

September 4, 1975 (on or about): Tovar and Moore were evicted from 135 South Main by the landlord and sued for rent.

August 28, 1975: A deed on property at 250 North Main, used to retail childrens' clothes under the name of "Jack and Jill Shop" is acknowledged by the grantor before

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5/ The Opposition to Motion For Summary Judgment filed by Tovar and Moore on or about August 11, 1980, provides at page 8, lines 4-8, "These Plaintiffs while never having had the benefit of a formal marriage ceremony have resided together for many years and have had several children together, and are husband and wife, in fact. Moreover, they are business partners. See depositions of Joseph Tovar and Deborah Ann Moore."

a notary public. The property was purchased in the name of Deborah Moore. Joint funds of $5,000.00 were used for the down payment.

September 1, 1975: Tovar and Moore took possession of the "Jack and Jill Shop" at 250 North Main and hired an architect for structural changes to the building for use as a motion picture theater.

September 2, 1975: Under the Pocatello Zoning Code, only those uses mentioned in the permitted use list are proper. Uses not specifically mentioned may be authorized by conditional use or variance. At a September 2, 1975 meeting, the City Council noted that the list of permitted uses in the Commercial Central Zone did not expressly allow "motion picture theaters". On that date, the City Council "interpreted" the Zoning Code to provide that indoor motion picture theaters are "amusement enterprises", and are allowed in the Commercial Highway and Industrial Zones.

September 5, 1975: Tovar and Moore quit the premises at 135 South Main.

September 10, 1975: Moore applied for a building permit to remodel the "Jack and Jill Shop" into a motion picture theater.

September 17, 1975: Moore applied for a conditional use permit to operate a "amusement enterprise" (private adult bookstore and theater) in the Commercial Center Zone at 250 North Main Street.

October 8, 1975: The Board of Adjustments granted Deborah Moore's conditional use application.

October 23, 1975: The Pocatello City Council heard an appeal on the decision by the Board of Adjustments, filed by the members of the Downtown Merchants. The City Council voted 5-2 to overturn the decision of the Board of Adjustments with Councilmen Puree and Pond voting "No".

October 27, 1975: Deborah Moore applied for and was granted a permit to

remodel the property at 250 North Main Street as a "new bookstore and photo studio".

B. The Initial Controversy In The Idaho Court (Civil Action No. 34096). Tovar and Moore Elect To Proceed In The State Court System Under The Procedural Remedy Which The State Of Idaho Has Provided. (See Appendix "A".)

December 9, 1975: Deborah A. Moore filed state court civil action No. 34096, entitled "Petition To Review Denial of Variance", alleging jurisdiction pursuant to Idaho Code § 67-6519 and violations of the Idaho Constitution. The concluding paragraph of § 67-6519 provides:

> "An applicant denied a permit or aggrieved by a decision may within sixty (60) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by sections 67-5215(b) through (g) and 67-5216, Idaho Code."

§ 67-5215 provides in its pertinent part:

> "(f) . . . In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs."

"(g) . . . The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constututional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

§ 67- 5216 authorizes an appeal to the Idaho Supreme Court, providing in part:

"Appeals.-- An aggrieved party may obtain a review of any final judgment of the district court . . . by appeal to the Supreme Court. The appeal shall be taken in the manner provided by law for appeals from the district court in other civil cases . . . ."

State Civil Action No. 34096 requested review of the City Council's determination and

that the decision of the City Council be:

> "reversed, annuled, and set aside and the decision of the Board of Adjustments reinstated, or in the alternative . . . 2. That the Court direct an order to the City Council to issue Petitioner a conditional use permit; and 3. Such other and further relief as may be just and proper."

C. Tovar And Moore File A Duplicative Civil Rights Action In The U.S. District Court (Civ. 4-75-59), Alleging Both Constitutional Violations And Pendant State Claims. (See Appendix "B")

December 22, 1975: Joseph Tovar and Deborah Ann Moore filed federal civil action 4-75-59, entitled "Complaint (Injunction; Declaratory Judgment; Damages)", alleging at paragraph 1:

> "The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1343; Title 28, United States Code, Section 1331; and, the doctrine of pendent jurisdiction. This action arises under the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America and Title 43, United States Code, Section 1983, and State law. The amount in controversy exceeds Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs."

D. In Idaho Civil Action No. 34096, The Idaho Trial Court Finds That The Defendants Have Not Acted Arbitrarily And That The Classification Of Theaters As "Amusement Enterprises" Was Not Unreasonable.

December 30, 1975: The trial court in State Civil Action No. 34096 issued a T.R.O., restraining Moore from showing films, operating a theater, or any other activity at 250 North Main in violation of the City of Pocatello Zoning Ordinance 1567.

January 13, 1976: In a Memorandum and Order in State Civil Action No. 34096, District Judge Arthur P. Oliver, after a hearing, enjoined pendente lite Deborah Moore from showing films or operating a theater at the premises known as 250 North Main Street in Pocatello, Idaho.

February 11, 1976: Following trial, the State District Court in State Civil Action No. 34096 found and determined that the City Council had not acted arbitrarily, capriciously or in abuse of discretion by denying the conditional use permit and that

the classification of theaters as amusement enterprises was not unreasonable. The Court held that the procedures followed in the October 23, 1975 Council meeting were improper in that the meeting was conducted as a public hearing and considered new evidence rather than being conducted as a review of the evidence submitted before the Zoning Board and remanded the case to the Council for further consideration and retained continuing supervisory jurisdiction.

March 18, 1976: The Pocatello City Council (composed of two different members recently elected) held hearings and again voted to deny a conditional use.

E. The U.S. District Court Abstains In The Federal Civil Rights Action, No. 4-75-59.

April 12, 1976: The U.S. District Court in Civil Action 4-75-59 abstained and suggested that, because of concurrent jurisdiction of the state court to enforce

42 U.S.C. § 1983, the Plaintiffs should bring all their claims under federal and Idaho law in Idaho state court.

July 23, 1976: Defendants filed a post abstention motion for outright dismissal.

F. Tovar and Moore File A Second Idaho State Court Action. (Civil Action No. 34739) (See Appendix "C".)

August 5, 1976: Joseph Tovar and Deborah Moore filed State Civil Action No. 34739 (4 counts) seeking monetary and injunctive relief against the City Councilmen and the City of Pocatello and seeking an order declaring the Zoning Ordinance tc be unconstitutional and invalid, or in the alternative that the ordinance was inapplicable to indoor motion picture theaters; or that an indoor motion picture theater was a permitted use at 250 North Main; and for reinstatement of the October 8, 1975 decision of the Board of Adjustment. The body of the Complaint limits its allegations to a claim that the zoning ordinance on its

face and as applied violates the provisions of the Constitution of the State of Idaho. (See Appendix "C".) Paragraph 8 of the prayer, however, prays:

> "8. for such other and further relief as the Court deems just and equitable."

> G. The Second State Court Action (Civil Action No. 34739) Is Dismissed. The State Trial Court Finds That The Same Issues Are Presently Pending In The First State Court Action (Civil Action No. 34096).

December 16, 1976: Idaho District Court Judge Arthur P. Oliver dismissed State Case No. 34739. As to Counts I, III and IV, the court stated that:

> "this same theory was presented to the District Court in the case of Moore v. City of Pocatello, et al., Bannock County Civil Case No. 34096. This Court has thoroughly reviewed that file and determines that that particular issue is still before Judge Hargraves in the last numbered case . . . The file is still open and this Court will not consider issues in the present case which duplicate the issues in Case No. 34096. Plaintiffs must proceed to a conclusion Case No. 30496 insofar as the issues therein raised."

H. The First State Court Action Is Dismissed (Civil Action No. 34096). Tovar And Moore Do Not Appeal That Final Judgment.

January 26, 1977: After a hearing on January 24, District Judge George Hargraves dismissed State Civil Action No. 34096 with prejudice upon a finding that the defendant City Council had fully complied with the Court's earlier orders dated February 1, and February 11, 1976; and that the Plaintiff Moore did not object or seek further review to the Court. Respondents did not appeal that judgment.

I. U.S. District Judge Callister Dismisses The Federal Civil Rights Action No. 4-75-59 On Abstention Grounds.

June 7, 1977: On a renewed application in Civil Action 4-75-59, U.S. District Judge Marion J. Callister ordered outright dismissal of the pending federal claims on the Younger-Huffman type of abstention.

J. The Idaho Supreme Court Affirms The Judgment Of Dismissal In The Second State Court Action. (See Appendix I.)

February 28, 1978: On appeal, the judgment of dismissal in State Case No. 34739 was affirmed by the Idaho Supreme Court in Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489. (See Appendix I.)

K. The Court Of Appeals Reverses The Dismissal Of The Civil Rights Action. (See Appendix J.)

November 6, 1979: Upon appeal, the Ninth Circuit in Tovar v. Billmeyer, 609 F.2d 1291, reversed U.S. District Court Judge Callister's judgment of dismissal in Civil Action 4-75-59 on the ground that the plaintiffs had not made an unreserved submission of all their federal claims to the state court, and could not be barred from returning to federal court with those claims. (See Appendix J.)

L. U.S. District Judge Callister Grants The Defendants' Motion For Summary Judgment. (See Appendix G.)

April 15, 1982: Upon remand of Civil

Action 4-75-59, U.S. District Court Judge Marion J. Callister granted the defendants' motion for a summary judgment and denied the plaintiffs' motion for a summary judgment. (See Appendix G.)

M. The Court Of Appeals Reverses The Summary Judgment Awarded To The Defendants And Holds That The City Council's Motivation Presents A Litigable Issue. (See Appendix K.)

December 15, 1983: Upon appeal, the Ninth Circuit in Tovar, et al. v. Billmeyer, et al., 721 F.2d 1260 reversed U.S. District Court Judge Marion J. Callister's summary judgment in Civil Action 4-75-59 on its finding that a fact issue existed as to whether the City's actions may have been motivated by a desire to suppress protected First Amendment expression. (See Appendix K.) The Ninth Circuit noted as to the state ruling at footnote 3:

> "3. The state court ultimately decided, as a matter of law, that the City Council had not acted arbitrarily or abused its discretion by interpreting 'amusement enterprises' to include indoor motion picture theaters."

and held in that regard at footnote 5:

> "5. We do not suggest that the Idaho state court was incorrect in concluding that the term 'amusement enterprises' was susceptible to an interpretation that included movie theaters. Nor do we disagree that, as a matter of state law, the interpretation was a reasonable one. See note 3, supra. The issue here, however, is whether the Council's decision to interpret 'amusement enterprises' for the first time at the September 2nd meeting was unconstitutionally motivated."

N. Post Judgment Petition For Rehearing.

December 22, 1983: Petitioners filed their "Suggestion for En Banc Consideration" (Rehearing) on the "Ebel" rule of law which had surfaced for the first time. (See Appendix M-1 et seq.)

January 31, 1984: Petitioners filed their "Supplemental Suggestion, Petition for Rehearing, and Request for Hearing En Banc", citing Migra v. Warren City School District Board of Education, et al., ___ U.S. ___, 79 L.Ed.2d 56, decided by this Court on January 23, 1984 (See Appendix M-5 et seq.)

February 3, 1984: Petitioners filed a

"Motion To Enlarge the Time for Filing and To Late File the Supplemental Suggestion, Petition for Rehearing, and Request For Hearing En Banc" (See Appendix M-13 et seq.)

February 7, 1984: The Ninth Circuit filed an Order rejecting the suggestion for rehearing En Banc (See Appendix N.)

February 21, 1984: The Ninth Circuit filed an Order denying "Motion To Enlarge the Time For Filing and To Late File the Supplemental Suggestion, Petition for Rehearing, and Request For Hearing En Banc" (See Appendix O.)

May 4, 1984: Associate Justice William H. Rehnquist signed an order extending the time for filing a petition for writ of certiorari to and including June 11, 1984.

SUMMARY OF ARGUMENT

I

A federal court must dismiss a 42 U.S.C., §1983 action where: (1) a state court action is pending; (2) an

important state interest (zoning) is "implicated;" (3) the constitutional claims can be raised in the State proceeding; and (4) the record establishes an absence of bad faith harassment etc. Middlesex County Ethics Committee, 457 U.S. 23 (1982).

Congress never intended to create federal jurisdiction and a 1983 cause of action where the state courts were available and would allow full litigation of all constitutional claims. It can no longer be claimed that every person is entitled to one unencumbered opportunity to litigate a 1983 right in a federal district court Allen v. McCurry, 449 U.S. 90 (1980).

A federal district court has jurisdiction to decide jurisdiction. Where a defendant is able to satisfy the four-part test of Middlesex County Ethics Committee, the federal court may

not assume jurisdiction of the 1983 federal claims. The state court must be allowed to adjudge the important state interest, apply presumptions, construe legislation to avoid serious constitutional doubt, save the legislation through statutory construction or severence etc., if necessary.

The critical interplay of state and federal powers in 1983 litigation and resulting dilemma is poignantly illustrated by the differing results which were reached in Spokane Arcades, Inc. v. Brockett, 454 U.S. 1022 (1982) and Metromedia Inc. v. San Diego, 453 U.S. 490 (1981). This Court should resolve this dilemma and fashion a procedural rule which will allow governmental bodies to litigate 1983 actions implicating important state interests in an efficient matter in a

state court.

II

Congress never intended to create a 1983 cause of action where the state system allowed "due process" litigation of constitutional questions Allen v. McCurry, 449 U.S. 90 (1980), Parratt v. Taylor, 451 U.S. 527 (1981). The principle inquiry is not "abstention" and "exhaustion" of state judicial remedies" but whether the plaintiff has stated a cause of action. See Vickory v. Walton, (721 F.2d 1062, C.A.6, 1983) which required a 1983 plaintiff to plead and prove both the substantive wrong and the inadequacy of the state corrective procedure.

Under Migra, 79 L.Ed.2d 56 (1984), the preclusive effect of Idaho judgments is determined by Idaho Law. In Idaho, a judgment is conclusive as between the parties and their privies on all issues

which were or should have been litigated in the action and bars relitigation of the same issues in a civil rights action.

The Ninth Circuit opinion was grounded on the Ebel rule of law, which was neither briefed nor argued in the appeal. The petition for rehearing en banc should have been granted. The Ebel rule is fallacious: "Motivation" of City Councilmen may not be inquired into, unless bad faith, fraud, etc. are shown. Further, the federal court's assumption of jurisdiction on that issue is a collateral attack on the Idaho judgment, and is barred. District of Columbia Court of Appeal v. Feldman, 75 L.Ed.2d 206, 225 (1984).

The time for filing the petition for writ of certiorari began on Feb. 7, 1984 with the Ninth Circuit's order denying the petition for rehearing en banc. Rule 20.4.

REASONS FOR GRANTING THE WRIT

I

UNDER THE PRINCIPLES ESPOUSED IN MIDDLESEX COUNTY ETHICS COMMITTEE V. GARDEN STATE BAR ASSOCIATION AND OTHER ABSTENTION CASES, THE NINTH CIRCUIT WAS REQUIRED TO ABSTAIN AND DISMISS THE CIVIL RIGHTS ACTION.

In Middlesex County Ethics Committee, etc. v. Garden State Bar Assn., et al., 457 U.S. 423 (June 21, 1982), disciplinary proceedings were instituted by the local committee of the New Jersey disciplinary system against an attorney based upon an allegation of unethical conduct. Upon filing of a formal statement of charges, the respondent refused to answer, but instead filed suit in the United States District Court contending that the disciplinary rules violated his First Amendment right of free speech. The District Court granted the Bar Association's Motion to Dismiss based on Younger v. Harris, 401 U.S. 37 (1971), but the Court of Appeals reversed. On appeal, the majority of this Court held that

abstention was mandated, under the general principles previously expressed by this Court, "when important state interests are involved." See Middlesex County Ethics Committee, supra, at page 124 where this Court noted:

> "The policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved. Moore v. Sims, 442 U.S. 415, 423, 60 L.Ed.2d 994, 99 S.Ct. 2371 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-605, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975). The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in Huffman, supra. Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation. Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 97 S.Ct. 1911 (1977); Juidice v. Vail, 430 U.S. 327, 51 L.Ed. 376, 97 S.Ct. 1211 (1977). Where vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.' Moore, supra, at 426, 60 L.Ed.2d 994, 99 S.Ct. 2371. '[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . .' Id., at 430, 60 L.Ed.2d 994, 99 S.Ct. 2371.

See also Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973)."

Petitioners contend that the Middlesex County Ethics Committee case at pages 124-126, enunciates a four part test for Federal Court abstention in non-criminal proceedings involving important state interests, which controlled the discretion of the Ninth Circuit below and required it to dismiss the federal action herein. Under the Middlesex County Ethics Committee majority opinion, the Ninth Circuit's refusal to abstain in the first appeal in C.A. No. 77-2929 (see Appendix J) constitutes abuse of discretion which should be corrected upon this appeal. See footnote 1 on page 1, supra.

Simply stated, the Middlesex County Ethics Committee four part test is:

1. Is a State action pending?

2. Do the proceedings implicate important state interests (i.e., are important State policy questions involved?)

3. Can the constitutional challenges

be raised in the state court?

4. Is there a showing of bad faith, harassment or some other extraordinary circumstance which would make abstention inappropriate?

The record herein clearly demonstrates that the Middlesex County Ethics Committee four part test has been satisfied and that abstention is mandated:

1. A State Action was pending. Tovar and Moore themselves elected to pursue the state court remedy.

2. The state court proceedings implicated important state interests (zoning). This Court has previously expressed its attitude toward local zoning. In Berman v. Parker, 348 U.S. 26, 33 (1954), the Court held that land use regulations may promote 'values [which] are spiritual as well as physical, aesthetic as well as monetary.' In Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974), the Court said that zoning could be used to create and promote living areas that protect 'family values [and]

youth values. In his plurality opinion in Young v. American Mini Theaters, 427 U.S. 50 (1976), Associate Justice Stevens referred to the City's zoning interest at page 71, as "one that must be accorded high respect." In his concurring opinion in Young, supra, at page 80, Associate Justice Powell noted that the interest furthered by the adoption of zoning ordinances "is perhaps the most important function performed by local government". It would seem clear therefore that the zoning interest qualifies as an "important state interest" within the meaning of Middlesex County Ethics Committee, supra.

As this Court noted in the Middlesex County Case at page 125, footnote 12:

> ". . . whether the proceeding is 'labeled civil, quasi-criminal or criminal in nature,' the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state. Id., at 355-336." (Our emphasis.)

There can be no doubt that the federal court

has "unduly interfere(d) with the legitimate activities of the state" herein. See Statement of the Case, supra, at page 8.

3. The federal plaintiffs had an adequate opportunity to raise their constitutional challenges in the state proceedings. As noted in the Statement of Facts above at pages 18-19 , the U.S. District Judge, in abstaining in the first instance, on April 12, 1976, noted that the plaintiffs could bring their claims under federal law in the Idaho State Court Action. Further, Idaho District Judge Oliver in the second civil action which was filed by Tovar and Moore, noted that those claims could be pursued in the first state action. See Statement of Facts, supra, at page 20.

4. There is no showing of bad faith, harassment or extraordinary circumstance which would make abstention inappropriate. The record does not show any evidence of bad faith, harassment, or other extraordinary

circumstances. The findings of fact in the state lawsuit are to the contrary. See Statement of Facts, supra, at pages 17 -18.

It was both a usurpation of jurisdiction, see District of Columbia Court of Appeal v. Feldman, et al., ___ U.S. ___, 75 L.Ed.2d 206 at 225 (Mar. 23, 1983), and an abuse of discretion for the Ninth Circuit to fail to abstain from the exercise of jurisdiction in this matter. Although Chief Justice Burger's majority opinion (joined by Justices White, Powell, Rehnquist and O'Connor) did not elaborate upon the grounds for the reversal in Middlesex County Ethics Committee, it seems clear that at the very least, the reversal was based upon an abuse of discretion. See Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800 at 816, fn. 22, 47 L.Ed.2d 483 at 497, fn. 22, 96 S.Ct. 1236 (1976).

A. In Applying The Four Part Test Set Forth In Middlesex County Ethics Assn., The Federal Court Must Abstain If The First Three Parts Of The Test Are Satisfied And If The Statute Or Ordinance Is Susceptible Of A Constitutional Construction In The State Court. It May Only "Assume Jurisdiction" Where The Challenged Statute Is "Flagrantly And Patently Violative Of Express Constitutional Prohibitions In Every Clause, Sentence And Paragraph And In Whatever Manner And Against Whomever An Effort Might Be Made To Apply It".

In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), this Court held that the first three parts of the Middlesex County Ethics Committee test had been satisfied. The Huffman case, however, was not ordered dismissed as was done in Middlesex County, but was remanded to the U.S. District Court to determine whether the fourth part of the test had been satisfied so that the court could "assume jurisdiction"; that is at page 497:

> "whether . . . the District Court may assume jurisdiction under an exception to the (Younger) policy against federal judicial interference with state court proceedings of this kind." (our emphasis.)

During the 1976 October Term, however, Huffman v. Pursue Ltd., supra, was further applied by this Court in other civil cases: Juidice v. Vail, 430 U.S. 327 (Mar. 22, 1977) and Trainor v. Hernandez, 431 U.S. 434 (May 31, 1977) and distinguished in Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977). In his dissent in Juidice, Justice Stewart noted a significant difference between Pullman abstention and Younger-Huffman abstention, at pg. 348:

> "...Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between the two. Under Pullman abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (Our emphasis.)

See also Trainor v. Hernandez, 431 U.S. 434,

445 (May 31, 1977)[7/] and Moore v. Sims, 442 U.S. 415, 430 (June 11, 1979), citing the

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7/ In Trainor v. Hernandez, supra, the High Court held that where Huffman v. Pursue Ltd. applies, pendency of the state court action called for dismissal of the complaint.

> "...For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent. This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which Younger and Samuels v. Mackell primarily rest apply in full force here. The pendency of the state court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extradordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim." (Our emphasis.)

Trainer v. Hernandez text noted above, in holding that the principles of Younger-Huffman acted as a bar.

While the language of this Court in the above cases does not specifically hold that federal "jurisdiction" is in question, that appears to be at the very core of the problem. If not, what would be the reason for distinguishing between Pullman abstention and Younger-Huffman abstention?

That a federal court lacks "jurisdiction" in matters involving state sovereignty, where the trial facts show that the constitutional claim can be raised and fully litigated in a civil action in the state court finds support in the rationale expressed in Allen v. McCurry, 449 U.S. 90 (Dec. 9, 1980). In Allen et al. v. McCurry, supra, a majority of this Court had occasion to rethink the legislative intent which authorized federal jurisdiction in Civil Rights cases, (42 U.S.C. section 1983). In

that decision, the majority made it clear that, except where the claim was made that a state statute was unconstitutional on its face, it was not intended by Congress that the federal courts should have jurisdiction over a 42 U.S.C. § 1983 federal cause of action where the state courts were available (as here) to allow full litigation of the constitutional claim, See Allen et al. v. McCurry, supra, at page 317:

> "...To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in Monroe v. Pape, supra, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (Our emphasis.)

Under Allen, et al. v. McCurry, supra,

Tovar and Moore can no longer claim that every litigant asserting a 42 U.S.C. § 1983 federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court. See Allen, et al. v. McCurry, 449 U.S. 90 at 103:

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdicion of the federal district courts to the wisdom of Congress. And no such authority is to be found in Section 1983 itself." (Our emphasis.)

and at 105:

> "The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that Stone v. Powell provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that

> case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so. 428 U.S., at 493-494, n 35, 49 L.Ed.2d 1067, 96 S.Ct. 3037; see Robb v. Connolly, 111 U.S. 624, 637, 28 L.Ed.2d 542, 4 S.Ct. 544 (Harlan, J.)

In remanding Huffman to determine whether the District Court "may assume jurisdiction", this Court defined the "jurisdictional" boundary line of that Younger "exception" at page 496 as:

> "Younger, and its civil couterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it'. As we have noted, the District Court in this case did not rule on the Younger issue, and thus apparently has not considered whether its intervention was justified by one of these narrow exceptions. . . ." (Our emphasis.)

In view of Huffman, supra, as explicated in this Court's recent opinion in Middlesex County Ethics Committee v. Garden

State Bar Assn., supra, it seems clear that where the first three parts of the test of Middlesex are satisfied and if the state statute or city ordinance is susceptible of a constitutional construction in pending proceedings in the state court, the federal court must dismiss the federal action.

The above rule of law was correctly expressed by the United States District Court, M.D. Florida, Tampa Division in Stecher v. Askew, 432 F.Supp. 997 at 999 (1977):

> "While as a general rule a State Surpeme Court may construe a statute which appears unconstitutional on its face in such a way as to render its application constitutional, see, e.g., Wainwright v. Stone, 414 U.S. 21 (94 S.Ct. 190, 38 L.Ed.2d 179) (1973), there may be cases in which such a construction, even though attempted, may be impossible. Under the facts alleged in the complaint, the plaintiff has standing to assert that this statute presents such a situation. The plaintiff has standing as to this issue: to wit, whether the statute is unconstitutional on its face and could not be rendered constitutional by any decision of the Florida Supreme Court." (Our emphasis.)

In seeking intervention by the federal court, Plaintiffs must successfully demonstrate that no further interpretation could bring the city ordinance under question within the confines of the protections insured by the Constitution. If there is any saving interpretation which the state court could make, plaintiffs must demonstrate that the state courts will not so construe it. As the Court said in Stecher, supra, at page 999:

> "For the plaintiff to succeed in this Court, he must successfully demonstrate that no further interpretation could bring this statute within the confines of the tests set out in Chaplinsky. In subsequent proceedings under this statute, however, there is absolutely no obstacle to the Florida courts' further defining the words 'Necessarily incite a breach of the peace' which were incorporated into this statute by State v. Mayhew, 288 So.2d 243 (Fla. 1973), as meaning 'words likely to cause an average addressee to fight.' Such construction would save the statute, and the plaintiff cannot demonstrate that the Florida courts will not so construe it." (Our emphasis.)

While it is true that a state or municipal defendant may consent to have the

federal court make that determination, see Ohio Bureau of Employment Services v. Hordory, 431 U.S. 471, 480, that is not the case here. Petitioner City of Pocatello has defended against Tovar and Moore's state lawsuits and has continuously resisted intervention by the Ninth Circuit.

Without doubt, the U.S. District Court has jurisdiction in such cases to decide the question of jurisdiction. U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). Where, however, a state statute or a city ordinance involving an "important state interest" is susceptible of a construction which will render the statute constitutional and a state court action is pending, under Middlesex County Ethics Committee, supra, the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court. One of the principle reasons why

this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task which is routinely performed by state courts.

The rationale in Middlesex County Ethics Committee, supra, which requires a federal court to defer to a pending state court action where an "important state interest" is concerned, is grounded upon several important policy considerations.

In the first place, there is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. Largely because of the doctrine of separation of powers, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. In People ex rel. Busch v. Projection Room Theater, 17 Cal.3d

55 at 56, the California Supreme Court noted, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts . . ." (Our emphasis.)

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Because federal courts do not bear the same relationship to state legislatures and don't function in the same manner as regards state legislation, see U.S. v. 37 Photographs, supra, the end result is certain to differ.

Additionally, the question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for federal and state governments.

See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

> "The cardinal principle of statutory construction is to save and not destroy."

The question as to whether a state statute is severable is more properly a matter for the state court. In a recent statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court upholding the ordinance on its face) remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding it held the ordinance to be unconstitutional on its face. See in this regard, Associate Justice White's opinion announcing the judgment of the Court at page 823,

footnote 26, wherein he addresses the issue of severability and the right of state courts in that regard:

> "Although the ordinance contains a severability clause, determining the meaning and application of that clause are properly responsibilities of the state courts. See Dombrowski v. Pfister, 380 U.S. 479, 497, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965) ('The record suffices . . . to permit this Court to hold that, without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face; until an acceptable limiting construction is obtained, the provisions cannot be applied.'); Liggett Co. v. Lee, 288 U.S. 517, 541, 77 L.Ed.2d 929, 53 S.Ct. 481, 85 A.L.R. 699 (1933) ('The operation of this [severability clause] consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court.'); Dorchy v. Kansas, 264 U.S. 286, 291, 68 L.Ed. 686, 44 S.ct. 323 ('In cases coming from the state courts, this Court, in the absence of a controlling state decision may, in passing upon the claim under the federal law, decide, also the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to that state court.'). This rule is reflected in the different approaches this Court has taken to statutory construction of federal and state statutes infringing

> on protected speech. Compare United States v. Thrity-Seven Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971), with Freedman v. Maryland, 380 U.S. 51, 60, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965). Since our judgment is based essentially on the inclusion of non commercial speech within the prohibitions of the ordinance, the California courts may sustain the ordinance by limiting its reach to commercial speech, assuming the ordinance is susceptable to this treatment." (Our emphasis.)

This critical interplay of state and federal powers in civil matters of this sort is poignantly illustrated by the differing results which were reached in Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir., 1980), affirmed, 102 S.Ct. 557 (1981) and Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). This Court's affirmance of Spokane Arcades, Inc. v. Brockett is frequently referred to as standing for the proposition that the challenged Washington Initiative is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in every manner and against

whomever an effort may be to apply it". Petitioners submit that a broad assessment of this sort is erronious and misunderstands the interplay of footnotes 6 and 7 of Dombrowski v. Pfister, 380 U.S. 479 at 490, as those footnotes relate to a correct understanding of the Spokane Arcades, Inc. decision and judgment. Properly interpolated, the Dombrowski footnotes hold that, notwithstanding a federal court may declare a state statute to be unconstitutional on its face so as to warrant the granting of a federal injunction against the application of the statute to the plaintiff, the state governmental authority may thereafter seek a restrictive interpretation of the statute in the state court, and thus "revive" the statute as to future violations against others. The dilemma is how this procedural step is to be accomplished! See, in this regard, Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), wherein, as noted above,

this Court, after finding the San Diego City Ordinance to be unconstitutional on its face, resolved the procedural dilemma and remand the cause back to the California Supreme Court for re-evaluation as to whether the California Supreme Court could render the ordinance a "limiting construction" which would "save" the statute.

In the light of this recent development in the law regarding the Metromedia case, it must necessarily follow that the decision of the Ninth Circuit in Spokane Arcades, Inc. v. Brockett, merely holds that the statute can not presently be applied to the plaintiff Spokane Arcades, Inc., and that those plaintiffs were entitled to an injunction against enforcement of the statute until the statute had been "narrowed". Under Dombrowski, that does not prevent the state courts in the State of Washington from asserting in a future state action that, under a restrictive interpreta-

tion, certain provisions of the 1977 Washington State Initiative can be constitutionally construed and "saved". Had Spokane County Prosecutor Brockett commenced an action in the state court, concomitantly with his defense of the federal action in the Spokane Arcades, Inc. case, the dilemma would have been resolved and the U.S. District Court in Seattle would have been required to abstain under the above principles expressed in Middlesex County. Having failed to initiate a state action which would invoke a Middlesex County fact situation and require that the state issue be resolved in the state courts, Brockett fell prey to the factual distinction which separated his case from Middlesex County--there was no pending state case!

The judicial inefficiency of continuing to permit the federal system to entertain jurisdiction of civil rights cases of this sort and render judgments thereon which, in

the final analysis under Dombrowski, are and must be inconclusive, when a state court civil action is pending and the state court system is ready, willing and able to consider the identical issues and render a judgment thereon, which will be binding and conclusive, is obvious.[8/] This Court should grant its writ of certiorari on this issue and provide a new procedural requirement, as outlined above, which will provide governmental bodies with the option of litigating such important state interests exclusively and efficiently in the state court system.

8/ In a speech prepared for delivery at New York University on November 18, 1982, Chief Justice Warren E. Burger has warned that if some drastic changes are not made, state and federal court systems could "literally break down before the end of the century" because of the burden of work being placed upon them:

> "'If every case in the Supreme Court is to continue receiving individual attention of justices, as has been the tradition, the caseload cannot continue at the present rate,' Burger said. 'It is not just a matter of maintaining the present case load. That load must be reduced.'"

See Los Angeles Daily Law Journal article of November 19, 1982.

II

TOVAR AND MOORE'S CIVIL RIGHTS ACTION FAILS TO STATE A CLAIM UPON WHICH FEDERAL RELIEF CAN BE BASED. BOTH THE DISTRICT COURT'S DISMISSAL AND SUMMARY JUDGMENT IN FAVOR OF THE CITY SHOULD HAVE BEEN SUSTAINED.

Under the rationale expressed above in Allen v. McCurry, 449 U.S. 90 (1980), and in Parratt v. Taylor, 451 U.S. 527 (1981), Congress intended to create a cause of action and establish federal jurisdiction under 42 U.S.C. § 1983 where one of the following three circumstances is shown to exist:

(1) The State substantive law is facially unconstitutional;

(2) The State procedural law is inadequate to allow full litigation of a constitutional claim; or

(3) The State procedural law, though adequate in theory is inadequate in practice.

In this case, none of the foregoing circumstances apply. The procedural law of the State of Idaho is entirely adequate to allow full litigation of all constitutional

claims, provided Tovar and Moore can allege sufficient facts to withstand a motion to dismiss or a motion for summary judgment. Tovar and Moore's Complaint is wholly deficient in this regard. Martinez v. California, 444 U.S. 277 (1980) (see Appendix B).

Petitioners submit that, as noted by District Judge Young's analysis of Parratt, supra, in Juncker v. Tinney III, 549 F.Supp. 574, the question is not abstention and whether the Plaintiff has exhausted his state judicial remedies, but rather whether the Plaintiff has stated a claim upon which relief can be based; at page 578:

> "The court argued that if Parrat were applied to cases involving liberty and life interests, this would relegate to the state courts so large a portion of § 1983 cases as to constitute in effect an exhaustion requirement, which the courts have consistently rejected under § 1983. This is simply incorrect; there is no connection between an exhaustion requirement and the policy of applying Parratt to all § 1983 cases. The argument for applying Parratt to liberty and life interest (and thus for sending many purported §

> 1983 cases to state court) is based not upon principles of comity but upon the language of the Fourteenth Amendment and upon the concept that in certain situations a complaint fails to state a claim under the Fourteenth Amendment because the plaintiff has not been deprived of a constututional right without due process of law. Proof of this difference lies in the different results. Under an exhaustion requirement, a plaintiff may sue in federal court after he has exhausted his state remedies. Under the Parratt analysis, if a plaintiff fails to state a claim under § 1983, he has no cause of action in federal court, and may sue only in state court." (Our emphasis.)

Very recently a majority of the Justices on a panel of the Sixth Circuit in Vickory v. Walton, 721 F.2d 1062 (CA 6th, Nov. 30, 1983) undertook an astute analysis of this Court's reasoning in Parratt, supra, and determined that 42 U.S.C. § 1983 was not meant to supply an exclusive federal remedy for every alleged wrong. The gist of the cause of action was a deprivation of property interest "without due process of law." Under this analysis, the court held the plaintiff must plead and prove that the state remedies for redressing the wrong were

inadequate. In other words, in a procedural due process case under 42 U.S.C. § 1983 (as here), plaintiff must attack the state corrective procedure as well as the substantive wrong. In Vickory v. Walton, supra, the Sixth Circuit held that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy. Applying the analysis of the Sixth Circuit in Vickory v. Walton to the pleadings and proof on file herein, is is clear that Tovar and Moore have neither alleged nor proven a cause of action under 42 U.S.C. § 1983 and the Petitioners were entitled to both a dismissal of the action in the first appeal, C.A. 72-2929 and summary judgment in the second appeal, C.A. 82-3258. See appendix E and appendix F.

III

THE PRINCIPLES EXPRESSED IN THIS COURT'S JANUARY 23, 1984 DECISION IN MIGRA V. WARREN CITY SCHOOL DISTRICT BD. OF EDUCATION, ET AL., REQUIRE THE NINTH CIRCUIT TO ACCORD FULL FAITH AND CREDIT TO THE FINAL JUDGMENTS WHICH WERE ENTERED IN FAVOR OF THE PETITIONERS IN THE IDAHO STATE ACTIONS FILED BY TOVAR AND MOORE, AND TO DISMISS THEIR FEDERAL CIVIL RIGHTS COMPLAINT ON RES JUDICATA AND COLLATERAL ESTOPPEL PRINCIPLES.

Based on the evidentiary hearings, orders, and final judgment of the State Court of competent and general jurisdiction, defendants pleaded res judicata and collateral estoppel in their Responses and Answers. (See Appendix D.) The defense of res judicata was covered extensively in the briefs for both appeals.

The applicable law on res judicata for the Ninth Circuit at the time of the filing of briefs appears in Scoggin v. Schrunk, 522 F.2d 436 (9th Cir., 1975) and, as quoted in the Petitioners' Brief (Brief of Appellees) at page 35, reads:

". . . It is now established that where the federal constitutional claim is

> based on the same asserted wrong as was the subject of a state action, and where the parties are the same, res judicata will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief. 'Appellant is not permitted to fragment a single cause of action and to litigate piecemeal the issues which could have been resolved in one action.' . . . This rule is made to apply to federal claims under 42 U.S.C. § 1983. . . ." (Our emphasis.)

In Migra, supra, this Court held that in a 1983 action, the preclusive effect of a state court judgment is determined by the law on res judicata of the state whose judgment was being considered. In the State of Idaho, the applicable law on res judicata is set forth in Tovar v. Billmeyer, 98 Idaho 891. See Appendix I at page I-22, where the Idaho Supreme Court noted:

> "In Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949), this Court stated that 'a judgment is conclusive as between the parties and their privies on all issues which were (or should

> have been) litigated in the action.' Id., at 128, 212 P.2d 1034; accord, Treese v. Treese, 84 Idaho 457, 373 P.2d 750 (1962)."

According to Migra, the rule of law expressed above in Tovar v. Billmeyer governs this appeal. All of the issues which were or should have been litigated in Case No. 34096 (see Appendix A) and case No 34739 (see Appendix C) have been concluded, and such final judgments bar relitigation of the same issues in the federal civil rights action (see Appendix B).

In addressing Petitioners' "Res Judicata" arguments for affirming the District Court's Summary Judgment, the Ninth Circuit completely ignored the Ninth Circuit precedent, Scoggin v. Shrunk, cited by Petitioners and reserved one small paragraph in footnote 8 for the Court's response (see Appendix K at page K-25):

> "First, defendants contend that res judicata bars plaintiffs' present action because the same issues have been litigated in state court. This court has already rejected this argu-

> ment. In Tovar v. Billmeyer, 609 F.2d at 1293-94, we held that '[a] free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court.' And, as we noted in Tovar, plaintiffs have consistently made an 'explicit reservation of constitutional issues'. Id. at 1239. Defendants' res judicata argument is thus without merit."

The Ninth Circuits' analysis, however, cannot be reconciled with this Court's previous expression in Allen v. McCurry, supra, (see pages 38-40 herein.)

Following this Courts' January 23, 1984 opinion in Migra v. Warren City School District Board of Education, Petitioners brought the Migra opinion on Res Judicata to the attention of the Ninth Circuit in a "Supplemental Suggestion, Petitions for Rehearing, and Request for Hearing En Banc" (see Appendix M at pages M-5 through M-12). The Court of Appeals also ignored the Migra opinion (see Appendix O-1). The Ninth Circuit's failure to address Migra, as requested in the petition for rehearing,

cannot be excused.

IV

UNDER THE PRINCIPLES EXPRESSED BY THIS COURT IN DISTRICT OF COLUMBIA COURT OF APPEALS, ET AL. V. FELDMAN, ET AL., THE NINTH CIRCUIT LACKED JURISDICTION OVER THE SUBJECT MATTER TO INQUIRE INTO THE MOTIVATION OF THE CITY COUNCIL IN ENACTING ZONING LEGISLATION.

On December 15, 1983, the Ninth Circuit filed its opinion in this case and, for the first time, raised and decided this appeal on a newly created rule of law, first expressed in Ebel v. City of Corona, 698 F.2d 390, 392 (9th Cir., 1983), which was neither briefed nor argued in either the trial court or in the Ninth Circuit. The "Ebel" rule of law provides that, notwithstanding the City's zoning ordinance was constitutional on its face, the enactment of the same (see Statement of Facts, supra, at page 12) could give rise to a federally created right and lawsuit, if the "motivation" of the City Councilmen was bad--- and this, in the face of two state court final

judgments that the City Council's interpretation was reasonable, and that their acts and conduct in such matter was not arbitrary, capricious, or an abuse of discretion, and in the face of a factual record which disclosed that the state court proceedings were fair on their face.

Petitioners submit that the Ninth Circuit's "Ebel" reasoning is clearly fallacious, and flies in the face of the weight of authority, which holds that "motivation" may not be inquired into, except for bad faith, fraud, etc., (which the record shows does not apply)[9/]. Further, it is contrary to the principle of law re "jurisdiction" expressed by this

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9/ See. generally, Sutherland Statutory Construction, vol. 2A, § 48.17, "Motives of Members of the Legislature" at pages 223-224, which states that references to the motives of members of the legislature in enacting a law are uniformily disregarded for purposes having to do with its interpretation except as they are expressed in the statute itself. Aldridge, et al. v. Williams, 3 How. 44 U.S. 9, 24, 11 L.Ed. 469 at 467 (1845). See, also McQuillin, Municipal Corporations, 3rd Ed., vol. 2 at pages 831-839 and vol. 5 at pages 266-278.

Court in District of Columbia Court of Appeals, et al. v. Feldman et al., ___ U.S. ___, 75 L.Ed.2d 206 at page 225, which holds that the Courts of Appeals may not collaterally attack state court judgments, and:

> "do not have jurisdiction, . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court."

Although Petitioners' pleading which was filed on December 22, 1983, was defectively labeled "Suggestion for En Banc Consideration", instead of "Petition for En Banc Rehearing', that label was a simple "misnomer". The Petition clearly stated valid grounds for a rehearing of the December 15, 1984 judgment--- in as much as the rationale in support of the opinion had not been briefed or argued by the parties. a petition for rehearing was intended, and the pleading was timely under F.R.A.P. Rule 40

to qualify as a Petition for Rehearing. See "History; Ancillary Laws and Directives" to Rule 35 in U.S.C.S. at page 224 reading:[10/]

> "In practice, the suggestion of a party that a case be reheard en banc is frequently contained in a petition for rehearing, commonly styled "petition for rehearing en banc". Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard en banc."

Further, the Ninth Circuit panel, in its order dated February 7. 1984, denying Petitioners' application treated the document as a petition for rehearing en banc (see Appendix N). The time for filing the petition for writ of certiorari began running on February 7, 1984, with the Court

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10/ When the Application on its face shows that a Petition for Rehearing is in order, as here, where the ratio decidendi has never been briefed or argued and is clearly in error, there is no rational reason for distinguishing between a "Petition for Rehearing" and a "Suggestion for Rehearing En Banc" in considering whether the strictures of F.R.A.P. Rule 35(c) are to be invoked. The obvious intent of Rule 35(c) is to preclude the tolling of the statutory period for the filing of a petition for writ of certiorari, where the only basis for the application is a reconsideration by an en banc panel of the same issues which were briefed and argued to the three judge panel.

of Appeals' denial of that petition for rehearing. See Stern and Gressman, Supreme Court Practice, 5th Ed., § 6.3 at pages 398-400; U.S. Supreme Court Rule 20.4.

CONCLUSION

For all of the reasons stated above, the Judgments of the Court of Appeals for the Ninth Circuit which were entered in C.A. No. 82-3258 and in C.A. No. 77-2929 should be reversed.

Dated: June 11, 1984

Respectfully submitted,

James J. Clancy
Attorney for Petitioners.

CERTIFICATE OF SERVICE

I, hereby certify that on this 11th day of June, 1984, the original and 40 copies of the within Petiiton for Writ of Certiorari were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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APPENDIX A

State Court Petition To Review Denial of Variance filed on December 9, 1975 in the District Court of The Sixth Judicial District of the State of Idaho, In and For the County of Bannock, entitled Deborah A. Moore, v. City of Pocatello, a Municipal corporation of Idaho, by the City Council of said City, consisting of C.G. Billmeyer, Donna Boe, F.W. "Bill" Roskelley, Mel Morgan, John Evans, Les Purce, and Earl Pond, being Case No. 34096

(Reference: See Petition for Writ of Certiorari at pp. 14, 59)

BILLY B. ISLEY, JR.
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

Deborah A. Moore Plaintiff,	Case No. 34096
vs.	PETITION TO REVIEW DENIAL OF VARIENCE
THE CITY OF POCATELLO, a Municipal corporation of Idaho, by the City Council of said City, consisting of C. G. BILLMEYER, DONNA BOE, F. W. "BILL" ROSKELLEY, MEL MORGAN, JOHN EVANS, LES PURCE, and EARL POND. Defendants.	

TO: THE SIXTH DISTRICT COURT OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

COMES NOW Deborah A. Moore and pursuant to Idaho Code Section 67-65 19, respectfully shows:

I.

That Petitioner is an individual person and the owner in possession of the following described premises located at 250 North Main Street in the City of Pocatello, County of Bannock, State of Idaho, to-wit:

> Northwesterly 21 feet and 9.35 inches of Lot 3, Block 431, POCATELLO TOWNSITE, Bannock County, Idaho.

II.

That Defendants above named are the duly elected members of the City Council of the City of Pocatello, pursuant to Title 50 of the Idaho Code.

III.

That on September 17, 1975, Petitioner applied to the duly authorized Board of Adjustments of the City of Pocatello for a permit to construct a private adult bookstore and

theater upon Plaintiff's above described property.

IV.

That at the public hearing conducted by the Board of Adjustments, the Board was urged by Petitioner to grant the application in that there were practical difficulties and unnecessary hardship which prevented strict compliance with the City of Pocatello zoning ordinance in that:

1. The premises in question are situated in the downtown area among many other non-conforming uses and within two blocks and upon the same street that Petitioner's former business was located for over three years; and

2. That Union Pacific parking lot is located directly east from Union Pacific Avenue which is contiguous to the entrance of Petitioner's premises, thus provided adequate

parking without adding to the congestion upon Main Street; and

3. That the highest and best use for the premises is an adult bookstore and theater since that particular use has already been successful in the same vicinity while other uses for the premises have proven financially unsuccessful.

V.

That on the 8th Day of October, 1975, the Board of Adjustments voted to grant Petitioner's conditional use permit, noting specifically that the proposed use was not inconsistent with the other uses in the area and the parking and traffic would not appreciably to the existing parking congestion of the area.

VI.

That on October 9, 1975, an appeal was taken from the decision of the Board of Adjustments by the "Downtown Merchants Association" and on October 23, 1975, was heard by the Defendant City of Pocatello and by its duly elected City Council who reversed the decision of the Board of Adjustments. The minutes of this meeting have not been prepared and therefore cannot be attached to this Petition.

VII.

That Petitioner was informed by the Defendant and therefore believed that the appeal from the Board of Adjustments would be restricted to a review by the City Council of the Findings of Fact and Conclusions of Law entered by the Board of Adjustments, but in fact the Defendant City Council invited additional input and testimony from the

many protestants and turned appellate review into a second public hearing and received new and additional evidence, all of which prejudiced this Petitioner who was not prepared for a second public hearing and who had justifiably relied upon Defendants' previous representations, all of which was prejudicial to Petitioner and deprived Petitioner of due process of law.

VIII.

That the decision of the Defendant City Council was arbitrary, capricious and characterized by an abuse of discretion and reeked of a pre-election concerted effort by the members of the City Council to prevent a lawful business of Petitioner from operating in that a special meeting of the City Council was convened September 2, 1975, for the sole and exclusive purpose of

designing a plan and method by which the permit and application of Petitioner could be denied; that a copy of the minutes of said meeting is attached as Exhibit A, and incorporated herein as though set forth verbatim.

IX.

That said decision and resolution of Defendant City Council is a final determination of the rights of Petitioner herein with respect to the matter to be reviewed; that sixty days have not elapsed since the filing of the decision in the office of the Defendant City Council and no previous application for the relief sought herein has been made.

WHEREFORE, Petitioner prays judgment as follows:

1. That the Court grant an order herein to review the determination of the Defendant City Council and that said

decision of the City Council be wholly reversed, annulled, and set aside and the decision of the Board of Adjustments reinstated; or in the alternative

2. That the Court direct an order to the City Council to issue Petitioner a conditional use permit; and

3. Such other and further relief as may be just and proper.

/s/ Billy B. Isley, Jr.
BILLY B. ISLEY, JR.
Attorney for Petitioner

APPENDIX B

Federal Court Civil Rights Complaint (42 U.S.C. § 1983) filed on December 22, 1975, in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Civil Action CIV4-75-59

(Reference: See Petition for Writ of Certiorari at pp. 16, 54, 59)

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES
DISTRICT COURT
DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiff,	)	CIVIL ACTION NO. CIV 4-75-59
vs.	)	
C.G. BILLMEYER; MELVIN MORGAN: F. W. "Bill" ROSKELLEY; JOHN; EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, and Idaho municipal corporation Defendants.	)	COMPLAINT (Injunction; Declaratory Judgment Damages)

Jurisdiction and Venue

1. The jurisdiction of this Court is invoked under Title 28, United States

Code, Section 1343; Title 28, United States Code, Section 1331; and, the doctrine of pendent jurisdiction. This action arises under the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America and Title 43, United States Code, Section 1983, and State law. The amount in controversy exceeds Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

2. Venue in this District is proper by virtue of Title 28, United States Code, Section 1391.

The Parties

3. The Plaintiffs.

Plaintiffs, JOSEPH TOVAR and DEBORAH ANN MOORE, are residents of Pima County, Arizona, and are owners of certain real property (described below) located in the County of Bannock, City of Pocatello, State of Idaho, upon which

plaintiffs wish to construct, house and operate an "adult" movie theater and book store.

4. The Defendants.

(a) Defendants, C.G. BILLMEYER, DONNA BOE, V.W. "Bill" ROSKELLEY, MELVIN MORGAN, JOHN EVANS, LES PURCE and EARL POND, (hereinafter collectively referred to as "Council Members"), are residents of the County of Bannock, State of Idaho, and were at all times material herein duly elected members of the City Council of the City of Pocatello, Idaho, duly organized and constituted pursuant to Title 50, Chapters 7 and 8 of the Idaho Code, and authorized by Title 50, Chapter 12, and Title 67, Chapter 65, of the Idaho Code to promulgate and maintain a zoning ordirance in and for the City of Pocatello, Idaho. Pursuant to said authority, defendants have enacted Title 11 of the Pocatello,

Idaho, City Code, a zoning ordinance.

(b) Defendant, WAYNE ELLIS, is the building inspector for the City of Pocatello, Idaho, duly appointed and confirmed by the authority conferred upon the Council by Title 50, Chapters 7 and 8 of the Idaho Code and Title 3, Chapter 6, of the City Code of the City of Pocatello, Idaho. Defendant ELLIS is authorized and required to issue building permits and certificates of occupancy in the City of Pocatello, Idaho, in conformity with Title 11 of the Pocatello City Code.

(c) Defendant, CITY OF POCATELLO, IDAHO, is a municipal corporation of the State of Idaho, created by Title 50 of the Idaho Code.

(d) The above-named individual defendants were at all times herein acting under color of State Law.

Factual Allegations

5. On August 31, 1975 and for approximately three (3) years prior thereto, plaintiffs owned and operated in the City of Pocatello, Idaho, at 135 South Main, and adult movie theater and book store known as the "Gallery Theater".

6. On or about September 1, 1975, defendant, MELVIN MORGAN, owner of a building located at 135 South Main, the City of Pocatello, Idaho, secured an Order evicting the Gallery Theater and Joseph Tovar from said premises.

7. On or about September 5, 1975, plaintiffs moved out and quit the premises at 135 South Main, Pocatello, Idaho.

8. Plaintiffs purchased on or about September 1, 1975, the real property and improvements located at 250 North Main in the City of Pocatello,

County of Bannock, State of Idaho, to-wit:

> The northwesterly 21 feet and 9.34 inches of Lot 3, Block 431, Pocatello Town Site, Bannock County, Idaho.

9. On September 2, 1975, defendant Council Members conducted a special meeting of the City Council of Pocatello. The purpose of the September 2, 1975, meeting was to devise methods preventing plaintiffs from opening or reopening an adult theater and book store at 250 North Main, Pocatello, Idaho.

10. On or about September 5, 1975, defendant MELVIN MORGAN, filed a Civil Action No. 33818 against the plaintiffs in the District Court of the Sixth Judicial District of the State of Idaho In and for the County of Bannock (a copy of said Summons and Complaint is attached hereto and by reference

incorporated herein as Exhibit "A").

11. On or about September 10, 1975, plaintiffs requested from defendant ELLIS a building permit for an adult theater and book store. Defendant ELLIS refused to issue a permit to plaintiffs on express orders from the Council Members.

12. Plaintiffs were advised by defendant ELLIS that, in order to secure a building permit, plaintiffs would have to apply for a conditional use permit pursuant to the zoning ordinance of the City of Pocatello because plaintiffs desired to operate a theater on the premises of 250 North Main, Pocatello, Idaho.

13. Defendant ELLIS has in the past issued building permits to motion picture theaters without the requirement of a conditional use permit.

14. On September 17, 1975, plaintiffs applied to the duly authorized Board of Adjustments of the City of Pocatello for a conditional use permit for the construction of a private adult book store and theater. Said application was approved by the Board of Adjustments on October 8, 1975 (a copy of the minutes and conclusions of the Board of Adjustments is attached hereto and by reference incorporated herein as Exhibit "B").

15. On October 9, 1975, an appeal was taken to the City Council of the City of Pocatello, Idaho, from the decision of the Board of Adjustments by the "Downtown Merchants' Association". Plaintiffs were thereafter advised that a hearing would be held before the City Council on October 23, 1975, and that the subject of said hearing would be limited to a review of the Board of

Adjustments' decision of October 8, 1975.

16. A hearing was conducted by defendant Council Members on October 23, 1975, twelve (12) days before defendants EVANS, BOE AND ROSKELLEY were to stand for election and without prior notice the hearing was open to public discussion and that subject matter of said hearing would include more than a review of the Board Adjustment's decision of October 8, 1975.

17. The City Council hearing of October 23, 1975, included public discussion and was not limited to a review of the Board of Adjustments' decision of October 8, 1975.

18. The Council Members of the City Council of the City of Pocatello, Idaho, voted on October 23, 1975, to reverse the decision of the Board of Adjustments

and to deny plaintiffs a conditional use permit.

19. Defendant ROSKELLEY, prior to the Council meeting of October 23, 1975, appeared at the Board of Adjustments' hearing on October 8, 1975, and distributed leaflets advocating plaintiffs' request for a conditional use permit be denied. Defendant ROSKELLEY also orally advocated the denial of plaintiffs' request for a conditional use permit during the course of said Board of Adjustments' hearing.

20. The zoning ordinance of the City of Pocatello, Idaho, does not authorize or permit the construction of a motion picture theater in the entire City of Pocatello, Idaho.

21. The City of Pocatello, Idaho, currently has within its boundaries two (2) motion picture theaters. None of the aforesaid theaters was required to

obtain or did obtain a conditional use permit.

22. The matters alleged in Paragraph 1 through 21 above are the constituent elements of a conscious pattern of bad faith harassment undertaken under color of State law and intended to deprive plaintiffs of their constitutionally protected rights under the Fourteenth Amendment to the United States Constitution, as alleged in Count II below.

COUNT I

Injunction

23. Paragraph 1 through 22 above are hereby incorporated by reference.

24. Unless restrained and enjoined, defendants intend to continue their bad faith harassment of plaintiffs by filing civil and/or criminal law suits which are designed to deprive plaintiffs of their constitutionally protected rights.

25. If not restrained or enjoined by this Court, the illegal actions of defendants alleged above will cause great, immediate and irreparable harm to plaintiffs, and plaintiffs will be deprived of their rights of freedom of speech, free assembly, freedom of association, freedom from the taking of their property without just compensation, due process of law and equal protection of the law, and will suffer irreparable loss of income, profits, good will and costs and expenses.

COUNT II

Declaratory Judgment

26. Paragraphs 1 through 22 above are incorporated by reference.

27. The zoning ordinance on its face and as applied to plaintiffs violates the Constitution of the United States as follows:

(a) The ordinance on its face and as applied violates the First Amendment to the United States Constitution in that said ordinance provides no zone for a theater and the requirement of obtaining a conditional use permit constitutes an unlawful prior restraint of freedom of speech.

(b) The ordinance on its face and as applied excludes from the entire City of Pocatello, Idaho, motion picture theaters and, therefore, violates the rights of freedom of speech and association secured by the First Amendment to the Constitution of the United States.

(c) The zoning ordinance on its face and as applied violates the First Amendment because it is void for vagueness and sweeps constitutionally protected rights within its scope.

(d) The ordinance as applied violates the equal protection clause of the Fourteenth Amendment in that it has not been applied to other theaters in the City of Pocatello.

(e) The ordinance on its face and as applied violates the Fifth and Fourteenth Amendments to the Constitution of the United States in that it constitutes an unlawful and unreasonable taking of property without just compensation.

(f) The City Council hearing of October 23, 1975, conducted under the color of State law, violated the due process clause of the Fourteenth Amendment in that plaintiffs were not given adequate or proper notice of the subject matter and scope of said hearing.

(g) The City Council hearing of October 23, 1975, conducted under the

color of State law, violated the due process clause of the Fourteenth Amendment in that at least two (2) members of said Council had exhibited bias and prejudice against plaintiffs and their position.

(h) The City Council hearing of October 23, 1975, conducted under the color of State law, violated the due process clause of the Fourteenth Amendment in that defendant, MELVIN MORGAN's, interests conflicted with those of the plaintiffs and plaintiffs were thereby denied an impartial panel.

(i) Denial of a building permit by defendants was arbitrary, capricious and for political purposes and was done willfully, knowingly and purposefully with the intent of depriving plaintiffs of the right to operate an adult theater and book store all in violation of plaintiffs' Fourteenth Amendment right

to due process of law and First Amendment rights of freedom of speech and association.

(j) Denial of a conditional use permit by defendants was arbitrary, capricious and for political purposes and was done willfully, knowingly and purposefully with the intent of depriving plaintiffs of their right to operate an adult book store and theater, all in violation of plaintiffs' Fourteenth Amendment right to due process of law and First Amendment rights of freedom of speech and association.

COUNT III

Damages

28. Paragraph 1 through 27 above are hereby incorporated by reference.

29. As a direct result of the actions aforesaid, plaintiffs have suffered and will continue in the future

to suffer a loss of income, profits, good will and have incurred and will continue to incur costs, fees and expenses.

COUNT IV

Tort - Interference With Prospective Pecuniary Advantages.

30. Paragraph 1 through 27 above are hereby incorporated by reference.

31. Defendants wrongfully, willfully, intentionally, maliciously and for their own political purposes prevented and precluded plaintiffs from obtaining prospective pecuniary advantages available to them through the exhibition and distribution of printed materials and motion pictures at 250 North Main, Pocatello, Idaho.

32. As a direct and proximate result of the actions aforesaid, plaintiffs have suffered and will continue to suffer in the future a loss

of income, profits, good will; and plaintiffs have incurred and will continue to incur costs, fees and expenses.

COUNT V

Tort - Nuisance

33. Paragraphs 1 through 27 above are hereby incorporated by reference.

34. Defendants wrongfully, intentionally, willfully, and unlawfully interfered with and prevented the lawful use of 250 North Main, Pocatello, Idaho, as a motion picture theater.

35. As a direct result of the actions aforesaid, plaintiffs has suffered, and will continue in the future to suffer, a loss of income, profits and good will; and plaintiffs have incurred, and will continue to incur, costs, fees and expenses.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

1. Declare unconstitutional and invalid the zoning ordinance of the City of Pocatello, Idaho, to the extent it requires a motion picture theater to obtain a conditional use permit.

2. Declare the zoning ordinance of the City of Pocatello, Idaho, unconstitutional and invalid to the extent that it prohibits motion picture theaters within said City.

3. Declare invalid and unconstitutional any and all provisions of the City of Pocatello zoning ordinance which requires plaintiffs to obtain a conditional use permit prior to operating a motion picture theater.

4. Declare invalid the City Council's hearing of October 23, 1975.

5. Reinstate the October 8, 1975, decision of the Pocatello Board of Adjustments.

6. Preliminarily and permanently enjoin defendants, their agents, employees and all persons acting in concert with them from initiating any action which is contrary to or inconsistent with, directly or indirectly, the decision and ruling of the Board of Adjustments of the City of Pocatello on October 8, 1975.

7. Preliminarily and permanently enjoin defendants, their agents, employees and all persons acting in concert with them from initiating any action which is predicated either directly or indirectly on a claim that the use of 250 North Main, Pocatello, Idaho, as a motion picture theater and book store is not a permitted use under

the zoning ordinance of the City of Pocatello, Idaho.

8. Issue a judgment in favor of the plaintiffs and against the defendants, and each of them, for a sum equal to plaintiffs' loss of income, profits, good will and costs, fees and expenses incurred in connection with the denial of the building permit and the conditional use permit.

9. Enter judgment in favor of plaintiffs and against defendants, and each of them, for punitive damages in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars.

10. Enter judgment in favor of plaintiffs and against defendants, and each of them, for reasonable attorneys' fees and costs in bringing this action.

11. Award plaintiffs such other and further relief as the Court may deem proper.

Respectfully Submitted

GREEN, FROST & CANTRILL

BY /s/ Davis W. Cantrill
David W. Cantrill

ROBERT J. HIRSH, P.C.

BY /s/ James A. Shiner
James A. Shiner

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

DEBORAH ANN MOORE, being first duly sworn, upon her oath, deposes and says: That she is one of the plaintiffs in the foregoing action; that she has read the foregoing complaint, knows the contents thereof; and that the same are true and correct to the best of her own knowledge and belief.

/s/ Deborah Ann Moore
Deborah Ann Moore

SUBSCRIBED AND SWORN to before me this _____ day of _____ 1975, by Deborah Ann Moore.

_____
Notary Public

My Commission Expires:_____

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

JOSEPH TOVAR, being first duly sworn, upon his oath, deposes and says: That he is one of the plaintiffs in the foregoing action; that he has read the foregoing Complaint, knows the contents thereof; and that the same are true and correct to the best of his own knowledge and belief.

_____
Joseph Tovar

SUBSCRIBED AND SWORN to

before me this _____ day of

_____ 1975, by Joseph

Tovar.

_____

Notary Public

My Commission Expires:_____

APPENDIX C

State Court Complaint filed on August 5, 1976, in the District Court of the Sixth Judicial District of the State of Idaho, In and For The County of Bannock entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Grant Anderson; Robert Meline; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Case No. 34739

(Reference: See Petition for Writ of Certiorari at pp. 19, 20, 59)

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ATTORNEYS FOR PLAINTIFFS

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AN FOR THE COUNTY OF BANNOCK

JOSEPH TOVAR and DEBORAH ANN MOORE,	
Plaintiffs,	Case No. 34739
	COMPLAINT
-vs-	
C.G. BILLMEYER; MELVIN MORGAN; F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; GRANT ANDERSON; ROBERT MELINE; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation,	
Defendants.	

Plaintiffs complain of defendants and for cause of action allege:

COUNT ONE

I.

Plaintiffs, Joseph Tovar and Deborah Ann Moore, are residents of Pima County, Arizona, and are owners of certain real property located Pocatello, Bannock County, Idaho; Defendants, C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Grant Anderson and Robert Meline, hereinafter collectively referred to as "Council Members", and Wayne Ellis are residents of the County of Bannock, State of Idaho; Defendant, City of Pocatello, Idaho is a municipal corporation of the State of Idaho, created by Title 50 of the Idaho Code.

II.

All acts alleged herein occurred in the County of Bannock, State of Idaho.

III.

Defendant Council Members were at all times material herein duly elected members of the City Council of the City of Pocatello, Idaho, duly organized and constituted pursuant to Title 50, Chapters 7 and 8 of the Idaho Code, and authorized by Title 50, Chapter 12, and Title 67, Chapter 65, of the Idaho Code to promulgate and maintain a zoning ordinance in and for the City of Pocatello, Idaho. Pursuant to said authority, defendants have enacted Title 11 of the Pocatello, Idaho, City Code, a zoning ordinance.

IV.

Defendant, Wayne Ellis, is the Building Inspector for the City of Pocatello, duly appointed and confirmed by the authority conferred upon the City Council by Title 50, Chapters 7 and 8 of the Idaho Code and Title 3, Chapter 6,

of the City Code of the City of Pocatello. Defendant Ellis is authorized and required to issue building permits and certificates of occupancy in the City of Pocatello, Idaho, in conformity with Title 11 of the Pocatello City Code.

V.

On or about August 31, 1975, and for approximately three (3) years prior thereto, plaintiffs owned and operated in the City of Pocatello, Idaho, at 135 South Main, an adult movie theater and book store known as the "Gallery Theater".

VI.

On or about September 1, 1975, defendant, Melvin Morgan, owner of a building located at 135 South Main, Pocatello, Idaho, secured an Order evicting the Gallery Theater and Joseph Tovar from said premises.

VII.

On or about September 5, 1975, plaintiffs moved out and quit the premises at 135 South Main, Pocatello, Idaho.

VIII.

Plaintiffs purchased on or about September 1, 1975, the real property and improvements located at 250 North Main, Pocatello, Bannock County, Idaho, more particularly described as follows:

> The northwesterly 21 feet and 9.34 inches of Lot 3, Block 431, Pocatello Town Site, Bannock County, Idaho.

IX.

On September 2, 1975, defendant Council Members conducted a special meeting of the City Council of Pocatello. The purpose of the meeting was to devise methods preventing plaintiffs from opening or reopening an adult theater and book store at 250

North Main, Pocatello, Idaho.

X.

On or about September 5, 1975, defendant, Melvin Morgan filed a Civil Action No. 33818 against the plaintiffs in the District Court of the Sixth Judicial District of the State of Idaho In and For the County of Bannock (a copy of said Summons and Complaint is attached hereto and by reference incorporated herein as Exhibit "A").

XI.

On or about September 10, 1975, plaintiffs requested from defendants Ellis a building permit for an adult theater and book store. Defendant Ellis refused to issue a permit to plaintiffs on express orders from the Council Members.

XII.

That plaintiffs were advised by defendant Ellis, that in order to secure

a building permit, plaintiffs would have to apply for a conditional use permit pursuant to the zoning ordinance of the City of Pocatello because plaintiffs desired to operate a theater on the promise of 250 North Main, Pocatello, Idaho.

XIII.

On September 17, 1975, plaintiffs applied to the duly authorized Board of Adjustments of the City of Pocatello for a conditional use permit for the construction of a private adult book store and theater. Said application was approved by the Board of Adjustments on October 8, 1975.

XIV.

On October 9, 1975, an appeal was taken to the City Council of the City of Pocatello, Idaho, from the decision of the Board of Adjustments by the "Downtown Merchants' Association".

Plaintiffs were thereafter advised that a hearing would be held before the City Council on October 23, 1975, and that the subject of said hearing would be limited to a review of the Board of Adjustments' decision of October 8, 1975.

XV.

That a hearing was conducted by defendant council members on October 23, 1975, twelve (12) days before defendant, Evans, Boe and Roskelley were to stand for election, and without prior notice the hearing was open to public discussion and that the subject matter of said hearing would include more than a review of the Board of Adjustments' decision of October 8, 1975.

XVI.

The City Council hearing of October 23, 1975, included public discussion and was not limited to a review of the Board

of Adjustments' decision of October 8, 1975.

XVII.

The Council Members of the City Council of the City of Pocatello, Idaho, voted on October 23, 1975, to reverse the decision of the Board of Adjustments and to deny plaintiffs a conditional use permit.

XVIII.

Defendant Roskelley, prior to the Council meeting of October 23, 1975, appeared at the Board of Adjustments' hearing on October 8, 1975, and distributed leaflets advocating plaintiffs' request for a conditional use permit be denied. Defendant, Roskelley also orally advocated the denial of plaintiffs' request for a conditional use permit during the course of said Board of Adjustments' hearing.

XIV.

On or about March 18, 1976, pursuant to Court order, the City Council again voted to deny plaintiffs conditional use permit, but violated the terms and limitations of said Order and failed to give effect to the presumption of validity of the prior decision of the Board of Adjustments and failed to limit consideration to a review of the materials presented to the Board of Adjustments.

COUNT TWO

I.

Plaintiffs reallege paragraphs I through XIV inclusive of Count One and by reference incorporate the same herein.

II.

The zoning ordinance on its face and as applied to plaintiffs violates the Constitution of the State of Idaho as follows:

(a) The ordinance on its face and as applied violates Article I, Section 9 of the Constitution of the State of Idaho in that said ordinance provides no zone for a theater and the requirement of obtaining a conditional use permit constitutes an unlawful prior restraint of freedom of speech.

(b) The ordinance on its face and as applied excluded from the entire City of Pocatello, Idaho, motion picture theaters and, therefore, violates the rights of freedom of speech and association secured by Articles I, Section 9 of the Constitution of the State of Idaho.

(c) The zoning ordinance on its face and as applied violates Article I, Section 9 of the Idaho Constitution because it is void for

vagueness and sweeps constitutionally protected rights within its scope.

(d) The ordinance on its face and as applied violates the Due Process Clause of Article I, Section 13 of the Idaho Constitution in that it constitutes an unlawful and unreasonable taking of property without just compensation.

III.

The zoning ordinance does not apply to indoor motion picture theaters.

IV.

An indoor motion picture theater is a permitted use at 250 North Main, Pocatello, Idaho, under the zoning ordinance.

COUNT THREE

I.

Plaintiffs reallege paragraphs I through XIV inclusive of Count One and by reference thereto incorporate the same herein.

II.

Defendant have wrongfully, willfully, intentionally and maliciously and for their own political purposes prevented and precluded plaintiffs from obtaining respective pecuniary advantages available to them through the exhibition and distribution of printed material and motion pictures at 250 North Main, Pocatello, Idaho.

III.

As a direct and proximate result of the action aforesaid, plaintiffs have suffered and will continue to suffer in the future a loss of income, profits, good will and plaintiffs have incurred

and will continue to incur costs, fees and expenses.

COUNT FOUR

I.

Plaintiffs reallege paragraphs I through XIV inclusive of Count One and by reference thereto incorporate the same herein.

II.

Defendants wrongfully, intentionally, willfully and unlawfully interferred with and prevented the lawful use of 250 North Main, Pocatello, Idaho as a motion picture theater.

III.

As a direct and proximate result of the actions aforesaid, plaintiffs have suffered and will continue to suffer in the future a loss of income, profits and good will, and the plaintiffs have incurred and will continue to incur fees and expenses.

WHEREFORE, Plaintiff prays judgment as follows:

1. For an order declaring unconstitutional and invalid the zoning ordinance of the City of Pocatello, Idaho; or in the alternative declare said ordinance inapplicable to indoor motion picture theaters; or in the alternative, declare an indoor motion picture a permitted use at 250 North Main.

2. For a reinstatement of the October 8, 1975, decision of the Pocatello Board of Adjustments.

3. For an Order preliminarily and permanently enjoining defendants, their agents, employees and all persons acting in concert with them from initiating any action which is contrary to or inconsistent with, directly or indirectly, the decision and ruling of the Board of Adjustments of the City of

Pocatello, on October 8, 1975.

4. For an Order preliminarily and permanently enjoining defendants, their agents, employees and all persons acting in concert with them from initiating any action which is predicated either directly or indirectly on a claim that the use of 250 North Main, Pocatello, Idaho as a motion picture theater and bookstore is not a permitted use under the zoning ordinance of the City of Pocatello.

5. For judgment in favor of plaintiffs and against defendants, City of Pocatello, Roskelley, Evans, Boe, Billmeyer, Anderson, Melane and Morgan, and each of them, for a sum equal to plaintiffs' loss of income, profits, good will and costs, fees and expenses incurred in connection with the denial of the building permit and the conditional use permits.

6. For judgment in favor of plaintiffs and against defendants, City of Pocatello, Roskelley, Evans, Boe, Billmeyer, Anderson, Melane and Morgan, and each of them, for punitive damages in the amount of $250,000.00.

7. For judgment against defendants, and each of them, for reasonable attorney's fees and costs incurred in the institution of this action.

8. For such other and further relief as to the Court seems just and equitable.

GREEN & CANTRILL

BY /s/ David W. Cantrill
David W. Cantrill

APPENDIX D

Response and Answer of City of Pocatello filed on or about April 15, 1980, in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Civil Action CIV-4-75-59.

(Reference: See Petition for Writ of Certiorari at p. 57)

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Lawyers for Defendants

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE,	)	
Plaintiffs,	)	CIVIL No. 4-75-59
vs.	)	
C.G. BILLMEYER; MELVIN MORGAN, F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation,	)	RESPONSE AND ANSWER OF CITY OF POCATELLO
Defendants.	)	

COMES NOW the defendant, The City of Pocatello, an Idaho municipal corporation, and, preserving its prior defenses, responds to the complaint of the plaintiffs and answers same as follows:

FIRST DEFENSE

This Court lacks jurisdiction over such defendant, which is a political and governmental entity of the State of Idaho, as to the subject matter of this action either in the context of plaintiffs' allegations or by virtue of amendments IX, X, and XI, Constitution of the United States and the law defined in Quern v. Jordan ___US___, 59 L Ed 2d 383 (1979), Lake County Estates v. Tahoe Regional Planning Agency ___US___, 59 L Ed 2d 401 (1979), Nevada v. Hall ___US___, 59 L Ed 2d 416 at 423-425 (1979). The Court invoking the discretion on the basis and grounds defined in Moore v. Sims, ___US___, 60 1 Ed 2d 994 (1979) should not exercise jurisdiction of this litigation in the context of these claims, and by reason of the prior state Court litigation by plaintiffs.

SECOND DEFENSE

Should the complaint otherwise state a claim upon which relief could be granted to plaintiffs it fails, however, to allege or establish the necessary conditions precedent, (such as required statutory notice of claim to the defendant, City of Pocatello) encumbent upon the plaintiffs to so allege and establish, and certain conditions precedent in law to assert their grievances and claims which have not been met, and the allegations do not show the proper demand, or that the applications for and of administrative and judicial remedies have been undertaken and exhausted. The pendent state law claims asserted by plaintiffs have been adjudicated in state Courts having jurisdiction thereof and Count IV and Count V of the complaint should be stricken.

THIRD DEFENSE

Each Count of the complaint, in light of the record in this Court and proceedings in state Courts, now is barred by res judicata and/or collateral estoppel (see exhibits A through H referred to and incorporated by reference in Tenth Defense, and/or the complaint on file herein with uncontradicted factual matter of record affirmatively defeats, or fails to state, a claim upon which relief can or should now be granted to plaintiffs as against this defendant.

FOURTH DEFENSE

The allegations are insufficient to sustain a claim for monetary relief against this defendant, and/or do show the fact that this defendant is entitled to immunity either from suit or from claims of monetary damages and all allegations and prayers for monetary

relief should be stricken. The complaint does not state a claim for punitive damages against this defendant as there is no showing by proper allegation that this defendant acted willfully or that this defendant has acted in bad faith or for an improper motive and such allegations and prayers for punitive damages should be stricken for these and other reasons.

FIFTH DEFENSE

This defendant, alternatively to and supplemental to the above, preserves all rights and procedure for a three judge court provided by Chapter 155 (§§ 2281-2284) of Title 28, United States Code, where and when applicable to this proceeding.

Each of the Defenses Seventh through Fifteenth hereafter set out are adopted by reference as preliminary and continuing defenses herein.

SIXTH DEFENSE

(Answer)

This defendant denies every allegation in every paragraph of the complaint, unless hereinafter specifically admitted, and, in doing so, further denies, alleges and states as follows:

1. In answer to paragraph 1 of the complaint, admits only that plaintiffs are attempting to "invoke" jurisdiction as therein set out under the provisions of the United States Code referred to by them, but denies jurisdiction is proper under such provisions, denies jurisdiction, and denies all the allegations, averments and statements in the second and third sentence of such paragraph.

2. Denies paragraph 2; and states that the matter and claims cannot now be properly entertained as a diversity

action or on pendent state law jurisdiction or venue as these have been adjudicated in state Courts.

3. Admits that the plaintiffs or one of them are owners of certain real property (described later in paragraph 8 of their complaint) located in the County of Bannock, City of Pocatello, State of Idaho, and otherwise denies each and every allegation and averment of said paragraph 3.

4. Admits paragraph 4 save and except states in regard to the allegations of paragraph 4(a) that Les Purce is now a resident of the County of Ada, State of Idaho.

5. Denies the words "movie theater" in the third line of paragraph 5 and deleting and omitting such words "movie theater and" and deleting the last word of such paragraph: "Theatre," admits the allegations of paragraph 5.

6. Admits paragraphs 6 and 7; and, in answering paragraph 8, is not able to now admit or deny and so denies both plaintiffs purchased and owned said property and thus denies the standing of either party to maintain this action.

7. In answer to paragraph 9, admits only that on September 2, 1975, certain members of the City Council of Pocatello, conducted a special meeting and that included in the purposes of the meeting was a discussion of the Gallery and the zoning of the property at 250 North Main, Pocatello, Idaho, and the purpose for which this property was being, and would be contemplated to be used; and denies that defendants John Evans, Earl Pond and Wayne Ellis were at such meeting and states that they were not.

8. Admits paragraphs 10, 12, 14, 17 and 18.

9. Denies paragraphs 11, 13, 20, 21 and 22.

10. Denies the words "limited to" in the sixth line of paragraph 15 and reading the paragraph without these words and omitting same, admits paragraph 15.

11. Denies that the hearing mentioned in paragraph 16 was "without prior notice" and with these words omitted and deleted from the third and fourth lines of said paragraph, admits only that a hearing was conducted by the Pocatello City Council on October 23, 1975 and with those council members then in office and present, denying the remaining statements and averments of paragraph 16.

12. The defendant does not have sufficient information to either admit or deny and therefore, denies the allegations of paragraph 19.

13. As to the other allegations and paragraphs in Count I, Count II, Count III, Count IV and Count V, denies paragraphs 24, 25, 27, 29, 31, 32, 34 and 35; and, incorporates the responses and answers, denials and averments in paragraphs 1 through 22 in answer to paragraph 23 of Count I; and paragraph 26 of Count II; and paragraph 28 of Count III; and paragraph 30 of Count IV; and paragraph 33 of Count V.

SEVENTH DEFENSE

That this defendant, an Idaho Municipality, was acting in all matters of which plaintiffs complain and claim, in either a quasi-judicial or quasi-legislative function and capacity and this defendant so enjoyed an absolute immunity as such official entity of a judicial or legislative capacity under Idaho law.

EIGHTH DEFENSE

The defendant also alleges it is protected by official immunity against any and all claims of plaintiffs, and states that all acts and exercise of discretion were taken in the regular course of discharging official duties which affords to this defendant immunity from liability.

NINTH DEFENSE

That in all things and at all times this defendant acted in good faith and enjoys a privilege and/or immunity for all votes, actions and inactions as the Pocatello City Council including any act or omission of which plaintiffs complain.

TENTH DEFENSE

1. That the claims and causes of action set forth in the complaint all, and/or each of them, are barred by a final judgment of dismissal entered by

a Court of competent jurisdiction which became final on appeal; that is, in a case entitled as shown on exhibits E, F, G and H appended hereto and incorporated here by reference, in register number 34739, in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, wherein the Honorable Arthur P. Oliver, a judge of a Court of competent jurisdiction, entered on December 28, 1976, a final judgment, which was appealable and from which the plaintiffs did appeal to the Supreme Court of the State of Idaho, which appeal was entertained by said Court, and judgment by it entered on February 28, 1978 in docket number 12556, and which decision and opinion is published at 98 Idaho 891, 575 P2d 489, establishing the affirmance of the judgment entered by

Honorable Arthur P. Oliver in said docket number 34739.

2. That on December 9, 1975, prior to the filing of this suit, Deborah Ann Moore, a plaintiff here, on her own behalf and as privy for Joseph Tovar, filed a suit and litigation entitled as shown on exhibits A, B, C and D, appended hereto and incorporated here by reference, in register 34096 in which it was charged that the City decision and the City Council decision denying the conditional use permit was arbitrary and capricious and motivated by prohibited considerations. The matter was placed before a Court of competent jurisdiction and the judges of such Court. A Memorandum Decision was entered in that action, docket number 34096 on February 11, 1976, in which the Court found that the City Council had not acted arbitrarily, capriciously or

in abuse of discretion by denying the conditional use permit and found that the classification of "Theaters" as "amusement enterprises", was not unreasonable and arbitrary and implicit in this ruling, as authoritatively settled by the Idaho Supreme Court in its opinion in 98 Idaho 891 at 896, is the finding that the Zoning Code of your defendant City was not unconstitutionally vague; and, the Court, however, held the procedures followed at the October 23, 1976, Council meeting were improper in that the meeting was conducted as a "public hearing" and considered new evidence rather than as a review of the evidence submitted before the zoning board; and, thus, the said Court remanded the matter to the City Council of this defendant city. Pursuant to the mandate the City Council and council members again

reviewed the matter. No appeal was taken from the reconsideration and review. Earlier in such suit, the Memorandum & Order, exhibit B incorporated here by reference, entered on January 13, 1976, following the application of defendant City for an injunction was duly entered adjudicating the matters therein referred to.

On January 26, 1977, the suit and litigation so instituted by Moore on her own behalf and as privy for Tovar was dismissed by final order and a copy of such Judgment is exhibit A incorporated here by reference. No appeal was taken from this final judgment of dismissal by Tovar or by Moore. Based on the doctrines of res judicata and collateral estoppel, the plaintiffs here are barred and estopped from the claims and causes of action set forth in their complaint here as all and/or each of such claims

are barred by this final judgment of dismissal entered by the Court of competent jurisdiction which became final on the failure of Tovar or Moore to appeal.

3. A judgment is conclusive as between the parties and their privies on all issues which were or could have been litigated in the earlier action; and in this case all the matters pressed by the plaintiffs Tovar and Moore were, should have and could have been litigated in the prior actions and the final prior judgments have adjudicated the matter and bar the present claims.

ELEVENTH DEFENSE

1. That the judgments as set forth above in the TENTH DEFENSE, were duly entered as so alleged and such paragraphs 1 and 2 of TENTH DEFENSE are adopted by reference.

2. Such judgments that have been rendered by a Court having jurisdiction are not subject to collateral attack, and plaintiffs cannot now so attempt to relitigate the claims and matters or claimed wrongs which were or could have been presented in the prior litigations of which exhibits A through H demonstrate such files, pleadings and disposition.

3. The rights, questions and facts put in issue and determined by the Idaho Courts, which were of competent jurisdiction, cannot now be here litigated and disputed by these plaintiffs; and all the issues and claims of the plaintiffs in the idaho State Court proceedings are conclusive to the plaintiffs. The State and Federal actions are based on the same claimed wrong, and the plaintiffs here are not permitted to fragment and to

litigate piecemeal the issues which could have been resolved in one action.

TWELFTH DEFENSE

That prior to the filing of this action by the plaintiffs here, Deborah Ann Moore, on her own behalf, and as privy of Joseph Tovar, filed an action in State District Court; and after the filing of this action, the plaintiffs here filed another action in State District Court, and the State Court, having jurisdiction, at the instance of the plaintiffs in such state actions, litigated the same subject matter and the same or similar matters involving a common nucleus of operative fact, which said matters have been heard and adjudicated in State Court. These plaintiffs, having selected their forum and having allowed their claims to be adjudicated to conclusion are barred by res judicata and/or collateral estoppel.

THIRTEENTH DEFENSE

That the plaintiffs and each of them have failed to give notice of claim or demand required under Idaho law, in particular § 50-219, Idaho Code, §§6-903, 906 and 908, Idaho Code, Chapter 2, Title 50, Idaho Code and Chapter 9, Title 6 Idaho Code, and which notices and claims are conditions to maintain their claims under Idaho law and for their recovery herein.

FOURTEENTH DEFENSE

As and for further affirmative defenses this defendant states that any and all loss, damage, injury and matters of which the plaintiffs (or either of them) complain were on a risk assumed by them or because of their own negligence, that they intentionally purchased the subject property the use of which they wish to change, and that they are thus estopped from in any way presenting a

claim against this defendant, or at all, and have waived any and all rights they might otherwise have by intentionally proceeding as they have.

FIFTEENTH DEFENSE

That any and all claims, loss, damage and injury of the plaintiffs (or either of them) are barred by laches, by the failure of each plaintiff to undertake the appropriate and necessary conditions precedent in which to present claim, and each part of said claim, and because of failure by the plaintiffs to undertake necessary conditions precedent, and the non-occurrence of said conditions, and that things and matters in litigation in this court have been under several registry numbers undertaken in state proceedings and formal orders issued therein and the said plaintiffs failed to process and continue their appeals, if aggrieved,

and failed or neglected to process and exhaust administrative and appellate remedies and are now barred by applicable time limits, statutes of limitations and estopped by their own conduct from presenting claims against this defendant or at all and as to each and every part of their said purported claims.

WHEREFORE, this defendant prays that the Court decline to assert jurisdiction over it for any money damages or relief and/or disallow any such claims, and that the matters in this litigation be dismissed as to it, that plaintiffs' complaint be dismissed and that nothing be taken thereunder; that judgment be entered in favor of this answering defendant and as against the plaintiffs and that this answering defendant be awarded costs and expenses necessary and reasonably incurred in the

defense of this action and for such other relief as to the Court seems just and proper.

Dated this 15th Day of April, 1980.

JOHNSON AND OLSON, CHARTERED

L. Charles Johnson
303 Spaulding Building
Pocatello, Idaho 83201
Telephone: (208) 232-7926

Lawyers for Defendants

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true copy of the foregoing pleading to the following attorneys by placing same in the United State mail, postage prepaid, addressed to them as shown below, on this 15th day of April, 1980.

David W. Cantrill, Esquir
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P.O. Box 2597
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James A. Shiner, Esquire
William Walker, Esquire
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120 West Broadway
P.O. Box 3017
Tucson, Arizona 85701

/s/ L. Charles J
Licensed Lawyer

BEST AVAILABLE COPY

APPENDIX E

Defendants' Motion for Summary Judgment, filed on or about July 17, 1980 in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation, being Civil Action Civ 4-75-59.

(Reference: See Petition for Writ of Certiorari at p. 56)

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Lawyers for Defendants

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs, vs. C.G. BILLMEYER; MELVIN MORGAN, F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation, Defendants.	CIVIL No. 4-75-59 MOTION FOR SUMMARY JUDGMENT

COME NOW the defendants in the above titled cause, other than Earl Pond (who has before been dismissed with prejudice), and pursuant to and under the provisions of Rule 56 (b), Federal Rules of Civil Procedure, each for

herself, himself and itself, move for and because the depositions, affidavits and uncontroverted facts of record show that under the facts on which there is no genuine issue, each of the said defendants are entitled to judgment as a matter of law, and so move for judgment in favor of each said defendant and that as to each said defendant this action now be dismissed.

Done and dated 15th day of July, 1980.

/s/ L. Charles Johnson
L. Charles Johnson
JOHNSON AND OLSON, CHARTERED
303 Spaulding Building
Pocatello, Idaho 83210
Telephone: (208) 232-7926

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true copy of the foregoing and of pro forma judgment, and supporting Concise Statement of Material Facts, and supporting brief, together with documentary matter and affidavits to the following attorneys by placing same in the United States mail, postage prepaid, addressed to them as shown below, on this 17th day of July, 1980.

David W. Cantrill, Esquire
GREEN & CANTRILL
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/s/ L. Charles Johnson
Licensed Lawyer

APPENDIX F

Defendants' Concise Statement of Material Facts in Support of Motion for Summary Judgment filed on or about July 15, 1980, in the United States District Court, District of Idaho entitled Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation; being Civil Action Civ 4-75-59.

(Reference: See Petition for Writ of Certiorari at p. 56)

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Lawyers for Defendants

IN THE UNITED STATES DISTRICT
COURT DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs, vs. C.G. BILLMEYER; MELVIN MORGAN, F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation, Defendants.	CIVIL No. 4-75-59 CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Consistent with and pursuant to Rule 4(e) of this Honorable Court this concise statement of the material facts as to which the defendants, each for himself, herself and itself, contends there is no genuine issue follows:

Idaho is and was during the entire year of 1975 and following a state in the United States of America.

The City of Pocatello is and was during the entire year 1975 and following duly organized and constituted pursuant to the provisions of the statutes of the State of Idaho and is an incorporated city receiving its power, jurisdiction and functions under the Idaho Constitution, including Article 12 §2, thereof, and from the Idaho legislature, and it has for all material time been so duly organized and constituted and is the second largest city in the state of Idaho. Pursuant to the legislative grants and consistent therewith, and including, Title 50, Chapters 7 and 8 of the Idaho Code and authorized by Title 50, Chapter 12, and Title 67, Chapter 65, of the Idaho Code, the City of Pocatello promulgated and

maintained a comprehensive zoning ordinance in and for the City. Pursuant to proper authority the City and its Council members then in office and then duly elected, and prior to February 28, 1969, enacted Title 11 §11-1-1 through §11-2-3 of the Zoning Ordinance identified as 1567, of the Pocatello, Idaho, City Code, a zoning ordinance. Such zoning ordinance, as revised, and effective for the entire period 1972 through 1976, is submitted herewith (see affidavits of William L. Herrington and Wayne Ellis) together with other documents, including papers from the state Court proceedings.

Wayne Ellis, one of the defendants, was for all material times herein the building official, sometimes referred to as the building inspector, for the City of Pocatello, Idaho, duly appointed and confirmed by the authority conferred

upon the Council by the Idaho Code, including Title 50, Chapter 7 and 8 of the Idaho Code and pursuant to Title 3, Chapter 6, of the City Code of the City of Pocatello, Idaho. As the building official Ellis in his department issued or refused to issue permits and certificates of occupancy in the City of Pocatello, Idaho, and among his guides in such functions was the comprehensive zoning ordinance submitted herewith.

On or about August 28, 1975, the plaintiffs acquired control and right to possession of the real property and appurtenances located at 250 North Main, which has been described as the Northwesterly 21 feet and 9.34 inches of Lot 3, Block 431, Pocatello Town site, Bannock County, Idaho.

Prior to acquiring such property the plaintiffs, while having access to the zoning ordinance of Pocatello (Tovar

73) skimmed through these regulations and provisions but never actually read them (Tovar 73), and never scanned them in depth to determine where in Pocatello a theater or other entertainment type of function could be located under the zoning requirements (Tovar 74). Neither the realtor nor plaintiffs looked at a zoning map when discussing the purchase (Tovar 77-78). Indeed, plaintiffs did not discuss before the purchase the zone or land use situation with their realtor (Tovar 131). Plaintiffs did not discuss zoning with the title company (Tovar 80). Tovar just inquired of the realtor if there were buildings available in downtown Pocatello (Tovar 76).

Tovar and his attorney brought out that because of the nature of the business people refuse to sell him property (Tovar 122-123, also see Tovar 127 and 129).

Two persons "downtown" would not sell property to Tovar for his theater (Tovar 127; 129-130). No one refused to sell plaintiffs property at Fourth and Fifth Avenues in a proper zone for such amusement enterprise as a theater. Plaintiffs did look into "industrial light" (Moore 106) zone and other areas of permissive use and at least as to one property "it would have been too expensive" (Moore 107). Tovar "might have looked around that area" (Fourth and Fifth Avenues) but he felt: "There wasn't any property available except for downtown" (Tovar 111), although he saw vacant property with "for sale" signs up and down Fourth and Fifth (Tovar 112-113.)

There would be no difference in his business gross - overhead - profit if located on Fourth on Fifth or at 250 North Main (Tovar 112-113). In fact,

the available locations of Fourth and Fifth Avenue, being near the University, might be economically advantageous (Tovar 119-120). The City has done nothing to prevent or interfere with the operation by plaintiffs of a theater in such commercial highway or industrial light zones (Moore 108-109).

A month before the purchase Tovar looked at a zoning map in City Hall but did not discuss it with anyone at the City (Tovar 78-79). Although Tovar says he is not familiar with what the City ordinances require (Tovar 105), he became familiar with the designations such as industrial, industrial light, commercial highway, etc. (Tovar 110-111; 113). The only discussion regarding zoning implications before the purchase of the property at 250 North Main was over the telephone with Tucson lawyers who did not have a zoning map of

Pocatello (Tovar 81-81), and these lawyers, because the building at 250 North Main was in the same zone as the building on South Main concluded that plaintiffs could "go ahead and move" (Tovar 81).

Neither Tovar nor Moore appeared at any of the City meetings in regard to the application for a conditional use permit or to make a statement to support same (Tovar 92-93), which, of course, includes both the October 8, 1975, Board of Adjustments meeting and the October 23, 1975 City Council meeting (Tovar 93).

Moore and Tovar (Moore 80) had retained Vern Herzog and Billy Isley, licensed Idaho lawyers (Moore 80-81; Tovar 105-106) and the attorney Billy Isley, represented plaintiffs, including Moore, in her zoning appeals (Moore 85-87; Tovar 105-106).

In all her appeals and in these matters Moore knew there was no problem with the City for them in operating a bookstore, and a bookstore was a permitted use in the zone (Moore 87 and 104). Tovar knew this (Tovar 106-107).

In the other formal court proceeding (Register 34096), filed prior to the time the plaintiffs instituted this federal action, a temporary restraining order (TRO) issued in 1975 (Tovar 102-104), and Moore as privy instituted this other litigation contesting the October 23, 1975, Council action and decision as it impacted plaintiffs and the Gallery Theater operation (Tovar 103).

The plaintiffs had originally leased the property at 135 South Main as Joseph Tovar and Deborah Tovar for the operation of Pandora's Box, a sole proprietorship. At some undefined time

this has changed to The Gallery and evidently at some point indoor motion pictures were shown. Because of the showing of such alleged obscene and pornographic films the State and Bannock County authorities took action against The Gallery and/or its owners or operators. Each of the two "Tovars" in April, 1972 so signed the lease for the premises at 135 South Main, Deborah signing and acknowledging it as "Debi Tovar." However, Deborah alone took title of record in August, 1975, to the 250 North Main property, and, she alone sought the conditional use in September, 1975 and took the matter to the Board of Adjustments in October, 1975 and appealed the adverse ruling into State District Court.

Citizens in the City of Pocatello became aware in August - September, 1975 of activity in regard to the premises at

250 North Main (which had been used for retailing and was known as and sometimes referred to as the Jack N Jill shop), and because of the perception of some of these citizens who had businesses in the two hundred block of North Main in Pocatello that the premises at 250 North Main might be used as a theater, and the new owners might be expected to sell and distribute what is normally referred to as sexually oriented material from this location, including what some felt was the showing of sexually related amusement, F. W. Roskelley, a member of the City Council, in late August and September 1975 had such citizen concern expressed in relation thereto. Council member Roskelley informed the Mayor of his request for a session of the Council to discuss this with the City officials.

On and before September 2, 1975, there was such talk or rumor that

theater amusement activities, on September 2, 1975, the adjourned or executive meeting, sometimes referred to as work session, of the City Council of Pocatello was called by Mayor Billmeyer and was conducted (among other reasons) to discuss the ramifications of these proposed or expected operations. At that meeting several of the officials of the City confirmed that the zoning laws of the City of Pocatello precluded amusement enterprises such as the type of theater thought to be contemplated by the new purchasers at the former Jack N Jill shop location. Based upon such location not being appropriate for amusement enterprises, the location and operation of a movie theater was perceived to be impermissible and improper, without an appropriate application for "variance" (special use) or conditional use. Neither at this

meeting or afterwards, nor at all, has the City or its officials attempted to prevent the plaintiffs from operating and engaging in the operation of a book store at 250 North Main, Pocatello, Idaho. Neither at this meeting or afterwards, has the City or its officials attempted to prevent plaintiffs operating and engaging in the operation of any motion picture theater amusement enterprise in a proper zone; and there are several large areas so zoned for such amusement enterprises in Pocatello.

Under Idaho Law during 1974-1976 the determination of whether or not a sexually oriented business, of any type, including the dissemination of materials and matter and shows and related type of amusement, were governed by the laws of the State, including the Criminal Code of the State of Idaho, and were

plaintiffs in a formal application requested a building permit for "an adult theater and book store." The City and its Officers, including Wayne Ellis, refused to issue a permit which would grant in that particular zone where was located the property at 250 North Main such property to be utilized to operate a movie theater as such operation is in the determination and decision of the city and its officers an amusement enterprise for which the area was not zoned.

The defendant City and Wayne Ellis, advised the plaintiffs either through their attorneys and agents or otherwise, of his decision that in order to utilize and operate the premises at 250 North Main as a motion picture theater, one would need a special or conditional use permit in the land use, which application for such "variance" (special

use) or conditional use permit was provided in the zoning ordinances of the City of Pocatello.

On or about September 17, 1975, the plaintiff, Deborah Ann Moore, through her lawyer, applied to the Board of Adjustments of the City of Pocatello for a conditional use permit for the construction of an enterprise which would contain in the operation a theater. This application was approved by the Board of Adjustments on October 8, 1975.

On October 9, 1975, an appeal was taken to the Council of the City of Pocatello, Idaho from the decision of the Board of Adjustments. At the time of this appeal the Council was composed of C. G. Billmeyer, Melvin Morgan, F. W. Roskelley, John Evans, Les Purce, Donna Boe, and Earl Pond. On October 23, 1975, the said City Council, composed of

persons associated with The Gallery wanted to start a new theater at 250 North Main in Pocatello (the former Jack N Jill shop). It was the judgment and determination of Wayne Ellis, the City building official, that the location at 250 North Main was an impermissible use for a theater in such commercial central zone. Wayne Ellis discussed his decision that this location is not zoned to include theaters or other forms of amusement enterprises with and so consulted with the City Planner, City Attorney, and City Manager.

The Mayor called an executive or work session of the Council, with the City Attorney and other officials to discuss this and other matters. It was discussed; and, the conclusion of Wayne Ellis was corroborated and he was advised not to issue a permit that would deviate from the zoning regulations,

and, in particular, not to issue a building or other permit which allowed a new theater to be located in the commercial central zone of Pocatello. This advice conformed to the opinion and judgment of Wayne Ellis of the application of the applicable zoning regulations. In regard to the property at 250 North Main in Pocatello, books and other articles are not precluded from being dispensed in such zone or in and from such location and the ordinance was so construed by the officials and the City of Pocatello.

Because of the expressed concern of some citizens for the surmised use of the premises conveyed to F. W. Roskelley, and perhaps others, and because of such citizen contact and possibly the contact of the plaintiffs or their lawyers or agents with the City regarding the use of such premises for

implemented by procedures through the County Attorney and the Attorney General of the State, and the City and its officials served in relation thereto only as would any other citizens. During 1975 through 1977, the defendant City and the defendant City Officials did not as a City or as Officials undertake any formal court action in regard to the enforcement of prohibitions against such oriented material and/or movies and such related matter, leaving this to the County Attorney and the Attorney General and the normal law enforcement officers in the usual and customary discharge of duties in relation to the policing of the city and cooperating with state and county officers. The City did, however, enforce its zoning ordinance.

Building permits within the City of Pocatello were issued in 1975 by the

department directed by Wayne Ellis. That from the inception of such zoning ordinance on its effective date February 28, 1969 until July 19, 1976 such department had not issued a building permit for a motion picture theater. On July 19, 1976 a building permit was issued for construction of a commercial motion picture theater in a commercial highway zone. This theater was constructed in an area zoned for amusement enterprises. It is known as the Mann Theaters, also known as, Mann Triplex. This is the only location for which such a building permit was issued to construct a theater in Pocatello between February 28, 1969, and to July 19, 1976. After July 19, 1976, one other such permit was issued for construction in an area zoned for amusement enterprises, but the theater was never constructed.

The zoning ordinance of the City of Pocatello authorized and permits construction and establishment of motion picture theaters in areas which are zoned (1) commercial highway, (2) industrial light, and (3) industrial heavy. There was in 1975 and 1976 a significant amount of land within the City of Pocatillo, both developed and undeveloped, which is zoned commercial highway, industrial light, and industrial heavy. The zoning ordinance of the City of Pocatello, Idaho, authorizes and permits the construction and the operation of a motion picture theater in those areas which are zoned as amusement enterprises, which includes large areas of the city and which information was at all times known by the plaintiffs and their lawyers. Apart from The Gallery, no other of the theaters operating from enactment of the

zoning ordinance to the present in the City of Pocatello have operated in contravention of the zoning ordinance. Several theaters operating in Pocatello in 1975 qualified as a prior as a prior non-conforming use (grandfather right) under the City's zoning ordinance and under the so-called "grandfather right" they are allowed to continue their operation in a specific location as so utilized on enactment of the zoning ordinance. No theater has needed or applied for a "varience" (special use) or conditional use permit (other than The Gallery) from the enactment of the ordinance in 1969 to the present.

The denial of the application lodged by Deborah Moore with the City and the department headed by Wayne Ellis was only as it concerned a theater as an impermissible amusement enterprise in the commercial central zone. The

such council persons entertained the appeal and conducted the hearing. Plaintiffs have dismissed the present action against Earl Pond, with prejudice. He no longer is a defendant in this suit.

The City Council hearing of October 23, 1975, included public discussion and was not limited to a review of the Board of Adjustments' decision of October 8, 1975. The Council Members of the City of Pocatello, Idaho, duly voted on October 23, 1975, to reverse the decision of the Board of Adjustments and to deny a conditional use permit to operate the premises or to include in the operation of the premises at 250 North Main the motion picture theater.

That after the official meeting of the City Council and hearing of October 23, 1975, and within the time allowed by law, that is, on December 9, 1975,

Deborah Ann Moore, a plaintiff here, on her own behalf (and evidently as privy for Joseph Tovar), filed a suit in litigation in Register 34096 in title and as explained on Exhibits A, B, C and D, appended to the response and answer of the City of Pocatello, and which are submitted herewith. Each of these exhibits are true, accurate and correctly reflect what each purports to show. This state court litigation involved the same subject matter and the same facts and factual background as does the present litigation. The matter was placed before this Idaho Court of competent jurisdiction and the judges of such Court. A memorandum decision was entered in that action, register # 34096, on February 11, 1976, in which the Court found and held that the City Council had not acted arbitrarily, capriciously or in abuse of discretion

by denying the conditional use permit and in which the Court found that the classification of theaters as amusement enterprises was not unreasonable and arbitrary, and implicit in this ruling, as later authoritatively settled by the Idaho Supreme Court in its opinion in 98 Idaho 981, is the finding that the zoning ordinance of the City as adopted and applied was not unconstitutionally vague. The Court further held the procedures followed in the October 23, 1976, Council meeting were improper in that the meeting was conducted as a public hearing and considered new evidence rather than being conducted as a review of the evidence submitted before the zoning board; and, therefore, the said Court remanded the matter to the City Council of the defendant City. In the interim, several members of the City Council left office and others took

office. Several members of the Council serving in 1975 did not stand for re-election and new members were elected and assumed the office.

Pursuant to the mandate of the Court the City Council and Council members who then held office again reviewed the matter in a Council meeting on March 18, 1976. These Council members at such meeting in 1976 were Robert Meline, Grant Anderson, Les Purce, C. G. Billmeyer, F. W. Roskelley, John Evans, and Donna Boe. Robert Meline and Grant Anderson are not defendants in this suit. Plaintiffs did not join or serve them in this action and as to each of them, the statute of limitations bars action against them. The affidavit of William Herrington is referred to and the facts therein and exhibits authenticated through it are submitted herewith.

On this review, following the mandate from the District Court, the City Council again upheld the reversal of the Board of Adjustments and denied the application by the plaintiff, Moore, for a conditional use. On January 26, 1977, the suit and litigation so instituted by Moore on her own behalf, and as privy for Tovar, was dismissed by final order and the Judgment is attached to the response and answer of the City in this suit as Exhibit B and is submitted herewith. No appeal was taken from this final Judgment of dismissal by Tovar or by Moore.

The defendant City and each of the council persons here named as defendants were in the hearings both on October 23, 1975 and on March 18, 1976, acting in a quasi-judicial function and capacity, and at all times that the same said members were not so acting in such

matters of which the plaintiffs complain, such defendants were acting in a quasi-legislative function and capacity and all acts and exercise of discretion were taken in the course of discharging official duties.

The individual defendants each acted in good faith.

Tovar personally knows of no bad faith (Tovar 95-97) of any defendant except an alleged conflict of Melvin Morgan (Tovar 96). Indeed, Tovar knows of no expression of a threat or actual continuation to harass the plaintiffs by the City or its officials (Tovar 99). To put the matter to rest each named defendant, including Earl Pond, who has been dismissed with prejudice, has submitted an affidavit (in support of Summary Judgment) corroborating the good faith of each individual defendant. To avoid redundancy each of these

affidavits are referred to specifically and incorporated by reference here.

The affidavits of William Herrington and Wayne Ellis submitted to support summary judgment are referred to and the facts and documents authenticated therein are incorporated by reference here. All issues and theories of the plaintiffs in this proceeding, if not so raised in the state proceeding Register # 34096 could have been.

After the plaintiffs filed the instant litigation, upon the order of the Honorable J. Blaine Anderson, the plaintiffs were made to return to the State Court. The plaintiffs filed a separate action in State Court in a case entitled as shown on Exhibit E, F, G and H, appended to the answer of the defendant City, in Register # 34739, wherein the Honorable Arthur P. Oliver,

a judge of a court of competent jurisdiction, entered on December 28, 1976 a final judgment, which was appealable and from which the plaintiffs did appeal to the Supreme Court of the State of Idaho, and judgment by it was entered on February 28, 1978 in its Register # 12556, which decision and opinion is published in 98 Idaho 891, 575 P 2d 489, establishing the affirmance of the judgment entered by Honorable Arthur P. Oliver, in said Register #34739. The plaintiffs did not appeal to the United States Supreme Court from said final judgment of the Idaho Supreme Court. The litigation in Register # 34739, involved the same subject matter and the same facts and factual background as does the present litigation.

All claims and causes of action by the plaintiffs based upon state law or

pendent state jurisdiction have been and forever are barred by the final judgment of the Idaho Supreme Court in 98 Idaho 891 affirming the judgment in Register # 34739. All claims and causes of actions of the plaintiffs have been and are forever barred by the final Judgment of the said Court in Register # 34096, because a state judgment serves not only to bar every claim that was raised in the state court but also to preclude the later assertion in federal court of every legal theory or ground for recovery that might have been raised in the state proceeding.

Each count of the complaint in light of the record in this court and the proceedings in the state courts are now barred by res judicata and/or collateral estoppel. Based on the doctrines of res judicata and collateral estoppel, the plaintiffs here are barred

and estopped from the claims and causes of action set forth in their complaint here as all and/or each of such claims are barred by the final judgment of dismissal entered by the Court of competent jurisdiction which became final on the failures of Tovar or Moore to further appeal in the two separate actions below.

A judgment is conclusive as between the parties and their parties on all issues which were or could have been litigated in the earlier action; and in this case all the matters pressed by the plaintiffs Tovar and Moore were, should have, and could have been litigated in the prior actions and the final prior judgments have adjudicated the matter and bar the present claims.

To avoid redundancy in this memorandum the specific defenses of each of the defendants as set out in the

responses and answers and the affidavits in support of the motion for summary judgment are now called up and referred to by reference to the facts as delinated therein.

Dated this 15th day of July, 1980.

/s/ L. Charles Johnson
L. Charles Johnson
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303 Spaulding Building
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Telephone: (202) 232-7926

Lawyers for the City of Pocatello

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true copy of the foregoing and copies of the affidavits of: C. G. Billmeyer; Melvin Morgan; F. W. Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; William L. Herrington, and also copies of the zoning ordinance and those papers referred to in the affidavits of William L. Herrington and Wayne Ellis to the following attorneys by placing same

in the United States mail, postage prepaid, addressed to them as shown below, on this 17th day of July, 1980.

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/s/ L. Charles Johnson
Licensed Lawyer

APPENDIX G

Memorandum and Order of United States District Judge Marion J. Callister, filed on or about April 15, 1982, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation; being Civil Action Civ 4-75-59.

(Reference: See Petition for Writ of Certiorari at pp. 3, 22, 23)

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs, vs. C.G. BILLMEYER; MELVIN MORGAN, F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation, Defendants.	CIVIL No. 4-75-59 MEMORANDUM AND ORDER

Before this Court are the parties' cross-motions for summary judgment. The dispute in this matter concerns the operation for an "adult" indoor motion picture theater in Pocatello, Idaho ("the City"). The parties request this Court to rule on the validity of certain actions taken by the City which had an impact on the plaintiffs' ("Tovar") theater.

From September 1, 1972, through August 31, 1975, Tovar rented property and operated an adult bookstore and theater at 135 South Main Street in the City. In September, 1975, Tovar was evicted from this location. He subsequently purchased property at 250 North Main Street, and planned to operate an indoor adult motion picture theater (called the "Gallery Theater") on these premises. Both the South and North Street locations were zoned Commercial Central under the City's Zoning Code. The list of permitted uses in this zone does not expressly mention motion picture theaters. The Zoning Code provides that only those uses specifically mentioned on the permitted use list are proper.

On September 2, 1975, the Pocatello City Council held a meeting in which Tovar's Gallery Theater plan was

discussed. At some point the City Council interpreted the Zoning Code to provide that indoor motion picture theaters are "amusement enterprises" and thus are allowed in the Commercial Highway Zone which does not include Tovar's North Main Street location. After that City Council meeting, Tovar made application to the City Board of Adjusters for a conditional use permit to allow him to operate the Gallery Theater at the North Main location. The Board approved Tovar's application, but that decision was appealed by the "Downtown Merchants Association" to the City Council.

In October, 1975, the City Council held a meeting and reversed the Board's decision. Tovar appealed the City Council's decision by filing suit in the State District Court under Idaho Code § 67-5215 which allows for limited court

any alleged constitutional defects.

The Court reviews these claims under the standards set out in Fed.R.Civ.P. 56. Under that rule, summary judgment will only be granted when there are no material issues of fact and the moving party is entitled to judgment as a matter of law.

The Court first considers Tovar's contention that the City's Zoning Code operates as a prior restraint on protected communication. Tovar's argument is based on the fact that indoor motion picture theaters are not expressly mentioned in the list of permitted uses in the Zoning Code; any use not specifically permitted is prohibited:

> No building, structure, or land shall be hereafter used except as specifically permitted in this code.

Tovar claims that a complete ban on indoor motion picture theaters is a prior restraint on protected communication and therefore invalid under the First Amendment. The Court disagrees with Tovar's analysis for a number of reasons. First, the protected communication involved here is motion pictures, not indoor theaters. See Joseph Burstyn Inc. v. Wilson, 343 U.S. 495 (1952). The City has specifically permitted the showing of motion pictures by allowing the operation of "drive-in theaters" in the Commercial Highway Zone. Drive-in theaters are defined in § 11-1-3 of the Zoning Code as "an open lot . . . devoted primarily to the showing of moving pictures . . . ."

There is no claim that the City has prohibited the operation of drive-in theaters in the City. There is also no claim that the City has banned motion

review of permit denials. District Judge Hargraves heard the case (State Court Case I). Judge Hargraves reversed and remanded the City Council's decision due to the fact that the Council's meeting was conducted as a public hearing where new evidence was considered rather than as a limited review hearing upon the evidence presented to the Board. Judge Hargraves also found, as a matter of law, that the City Council had not acted arbitrarily or in abuse of its discretion by denying the conditional use permit, and also that the classification of "theaters" as "amusement enterprises" was not unreasonable and arbitrary. Tovar did not appeal that decision.

While State Court Case I was pending, Tovar filed the present action before this Court. In April, 1976, this Court granted defendants' motion to

abstain on the ground the Tovar's federal and state claims could be heard in State Court Case I. Proceedings in the present action were stayed until State Court Case I could be resolved.

In response to this Court's ruling, Tovar filed a second State District Court action (State Court Case II). In that action, also filed while State Court Case I was pending, Tovar claimed that the City's zoning ordinance was unconstitutional or in the alternative that an indoor theater was a permitted use in the Commercial Central Zone. Tovar also made tort claims against the City. The District Court granted defendants' motion to dismiss primarily on the grounds that Tovar's allegations could be tried in State Court Case I.

Tovar appealed the decision in State Court Case II. The Idaho Supreme Court rejected Tovar's appeal in Tovar

v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (1978). On appeal, Tovar had again raised the claim that the City's zoning ordinance was unconstitutionally vague. The court held that Judge Hargraves in State Court Case I had found that the zoning ordinance was not unconstitutionally vague, and that the City's interpretation of the Code was not unreasonable. Because Tovar did not appeal those findings, the Court held that he was bound by them.

When Judge Hargraves dismissed Tovar's complaint in State Court Case I, this Court also dismissed the present action on the basis of the abstention doctrine. This Court's decision was reversed in Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1980). The Ninth Circuit panel stated that because Tovar had not made an unreserved submission of all his federal claims to the court in State

Court Case I, he could not be barred from returning to federal court with those claims. The case was remanded to this Court for further proceedings.

As part of those further proceedings, the Court is now confronted with the parties' cross-motions for summary judgment. Tovar is seeking declaratory and injunctive relief on the grounds that: (1) the City's Zoning Code, on its face, prohibits motion picture theaters from operating anywhere in the city and is therefore invalid under the First Amendment as a prior restraint on protected communication; and (2) the Zoning Code is so vague that it violates the Due Process Clause of the Fourteenth Amendment. The City argues that it has interpreted the Zoning Code to permit operation of indoor motion picture theaters in the Commercial Highway Zone thereby curing

pictures in general. It is clear from the record that a number of theaters show motion pictures in the City. Thus, the Court is not faced with a situation where motion pictures are banned throughout the City; at most, only indoor theaters are affected.

But even if it is a constitutional violation to prohibit indoor motion picture theaters throughout the City, the City has now interpreted its Zoning Code to allow for the operation of such theaters in the Commercial Highway Zone. One of the many permitted uses in that zone is "amusement enterprises." The City has interpreted the term "amusement enterprises" to include indoor motion picture theaters. It is clear that a municipality may use its zoning laws to control the location of motion pictures theaters. Young v. American Mini-Theaters, 427 U.S. 50 (1976).

Tovar argues, however, that the City's interpretation of the Zoning Code is arbitrary and unreasonable.[1]

When the Court is faced with a constitutional challenge to a zoning ordinance, the City's interpretation of that ordinance is at least entitled to respectful consideration. See Law Students Research Council v. Wadmond, 401 U.S. 154 (1971); Chulchian v. City of Indianapolis, 633 F.2d 27 (7th Cir. 1980). Tovar argues that the City's interpretation is contrary to the wording of the ordinance. Tovar points out that one of the many permitted uses

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[1] There is no claim that the City has not in fact made such a narrowing interpretation of the Zoning Code. The Idaho Supreme Court in Tovar v. Billmeyer, supra at 893 stated:

> The City Council of Pocatello has construed the Zoning Code to provide that indoor motion picture theaters are "amusement enterprises" and are allowed only in zones permitting this use.

in the Commercial Highway Zone is "all permitted uses in in category CL, but regulated by the requirements herein." In category CL, one of the permitted uses is "studios excepting motion pictures." Tovar argues that the Zoning Code therefore expressly prohibits indoor motion picture theaters from the Commercial Highway Zone. However, the phrase "studios excepting motion pictures" could just as easily be interpreted as all studios except those where motion pictures are created and produced; in other words, the above-quoted phrase may not include within its definition "theaters" where the final product is shown to an audience. Moreover, the term "amusement enterprise" is not defined in the Zoning Code. It is certainly not unreasonable to view an indoor motion picture theater as an amusement enterprise.

After examining the entire record, this Court refusea to substitute its own judgment for the City's, when the City has held extensive hearings and has chosen one interpretation from among several reasonable alternatives. The Court concludes, as a matter of law, that the City's interpretation was not arbitrary and capricious. Indeed, the Idaho State District Court in State Court Case I agrees:

> The district court found that as a matter of law the City Council has not acted arbitrarily and capriciously in denying the conditional use permit. The district court also held that the City Council's interpretation of the Zoning Code was not unreasonable and arbitrary.

Tovar v. Billmeyer, 98 Idaho at 896[2].

[2]The Idaho Supreme Court did not rule on these findings by the district court. The Court held that Tovar was bound by those findings because he did not appeal from them.

Tovar's final First Amendment argument is that the Zoning Code infringes on free speech even if indoor motion picture theaters are permitted in certain zones. After examining the case of Young v. American Mini-Theaters, 427 U.S. 50 (1976), the Court disagrees with Tovar's contentions.

In Young, the City of Detroit passed a zoning ordinance that dispersed "adult" movie theaters throughout the city. The ordinance defined adult theaters on the basis of the content of their films. The ordinance had been passed at least partly because Detroit had found that a concentration of adult theaters adversely affected property values and caused an increase in crime. In rejecting plaintiff's claim that the ordinance was a prior restraint on free speech, Justice Steven's plurality opinion stated:

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

It is true, however, that adult films may only be exhibited commercially in licensed theaters. But that is also true of all motion pictures. The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason of invalidating these ordinances.

> Putting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment.[18]
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> 18. Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment . . . .

Id. at 321-322.

In the present case, the City's Zoning Code is not based on content. The Zoning Code has merely set aside certain locations for the showing of motion pictures. The Commercial Central Zone location was rejected for theater use after City Council hearings revealed parking and traffic problems which would result from motion picture theaters being permitted to operate there. The City has a significant interest in solving this traffic problems. See Metromedia, Inc. v. City of San Diego ___U.S.___, No. 80-195 July 2, 1981). Moreover,

> It also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." Village of Belle Terre v. Boraas, 416 U.S. at 13, 39 L.Ed.2d 797, 94 S.Ct. 1536 (Marshall J., dissenting).

APPENDIX H

Trial Judgment filed on or about April 15, 1982 in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Les Purce; Donna Boe; Earl Pond; Wayne Ellis; and the City of Pocatello, an Idaho municipal corporation; being Civil Action Civ 4-75-59.

(Reference: See Petition for Writ of Certiorari at p. 3)

Young v. American Mini-Theaters, supra at 80 (Powell, Jr., concurring).

For these reasons, the Court rejects Tovar's argument that the City's zoning ordinance violates the First Amendment.

Tovar next claims that the Zoning Code is so vague that it violates the Due Process Clause of the Fourteenth Amendment. The Zoning Code clearly does not allow indoor motion picture theaters in the Commercial Central Zone where Tovar seeks to locate the Gallery Theater. Certainly the Zoning Code is not vague as applied to Tovar.[3]

[3] Tovar argues that he operated an adult theater in the Commercial Central Zone from 1972 to 1975 in his South Main Street location, and was therefore mislead by the City into believing that theaters were permitted in that zone. Tovar was also issued a license to operate a theater in his South Main location. It is clear, however, that the issuance of the license was a ministerial act done by the city clerk upon payment of an issuance fee. It is

Despite that fact, courts have occasionally allowed a plaintiff to challenge ordinances, if the vagueness of the ordinance would have a real and substantial chilling effect on the protected speech of others. E.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967). As the Court has pointed out, however, motion pictures can be viewed throughout the City. The City's interpretation of the Zoning Code allows indoor theaters to operate in the City; the Code also expressly allows drive-in theaters. These Zoning Code provisions

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FOOTNOTE 3 CONTINUED
also clear that a city permit was neither applied for nor issued as required by § 11-3-1 of the Zoning Code. The Court can find the actions on the part of the City which would have mislead Tovar. Tovar purchased the North Main Street property at a time when the Zoning Code clearly did not allow indoor motion picture theaters at that location. Thus, the Court includes that the Zoning Code was not vague as applied to Tovar.

are clear and free of vagueness. There is no claim that the Zoning Code has the effect of suppressing or greatly restricting access to motion pictures. Thus, the Zoning Code does not have a real and substantial chilling effect. See Young v. American Mini-Theaters, supra at n. 35.

The Court finds that no material issues of fact exist and that the defendants are entitled to summary judgment as a matter of law. The defendants' motion for summary is hereby GRANTED, and the plaintiffs' motion for summary judgment is hereby DENIED.

Tovar has also brought a § 1983 action for damages resulting from the alleged constitutional deprivations discussed above. Because this Court has found that the plaintiffs' constitutional claims have no merit, the

plaintiffs' § 1983 claim is likewise DISMISSED.

IT IS SO ORDERED this _____ day of April, 1982.

MARION J. CALLISTER, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs, vs. C.G. BILLMEYER; MELVIN MORGAN, F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation, Defendants.	CIVIL No. 4-75-59 JUDGMENT

Having fully reviewed both the plaintiffs' and defendants' motions for summary judgment, and having heard oral argument on the matter; and the Court having found having found no material issues of fact, having filed its memorandum herein, and having found that the defendants are entitled to judgment as a matter of law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment be hereby GRANTED, and plaintiffs' motion for summary judgment be hereby DENIED.

DATED this 15th day of April, 1982.

/s/ Marion J. Callister
MARION J. CALLISTER, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX I

Opinion of Supreme Court of Idaho in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Grant Anderson, Robert Meline, Wayne Ellis, and the City of Pocatello, an Idaho Municipal Corporation, No. 12556, 98 Idaho 891, 575 P.2d 489 (Feb. 28, 1978).

. . . I-1 through I-23.

(Reference: Petition for Writ of Certiorari, at pp. 4, 9, 22, and 58.)

dispute in this appeal centers around the construction and operation of an "adult book store and theater" in downtown Pocatello, Idaho. The legal dispute between the parties commenced in the fall of 1975 and has resulted in the filing of two actions in state court as well as an action in federal district court. The federal suit has no bearing on this appeal however. This appeal is from the district court's decision in the second of the state court cases wherein the City's motion for summary judgment was granted. The events and surrounding legal actions are summarized below.

From September 1, 1972 through August 31, 1975 Tovar rented property and operated an "adult book store and theater" at 135 South Main Street in Pocatello, Idaho. On September 1, 1975 Tovar was evicted from these premises and subsequently purchased a building and

property at 250 North Main Street in Pocatello. Tovar planned to remodel the building on the property and operate an "adult book store and theater." Both these locations were zoned "commercial central" under the Zoning Code of the City of Pocatello (hereinafter "Zoning Code"). Subsequent to September 2, 1975, the respondent Wayne Ellis, the Pocatello Building Inspector, informed Tovar that a bookstore was a permissible use on this property but the property was not zoned for a "theater." Ellis informed Tovar that the property was zoned "commercial central" a zone not including "theaters" as a permitted use. Ellis further informed Tovar that a conditional use permit had to be secured from the Zoning Board of Adjusters before the building permit could issue.

An explanation of the Zoning Code is warranted. The Zoning Code divides the

only in zones permitting this use.[5]

On September 17, 1975, after Tovar was informed by Ellis that a conditional use permit was needed, Tovar made application to the Board of Adjusters for the permit. On October 9, 1975 the Board of Adjusters granted the conditional use permit. This decision of the Board of Adjusters was appealed by the "Downtown Merchants' Association" to the City Council. Tovar was informed that this appeal would be limited to a review of the Board of Adjusters' decision. On October 23, 1975 the City Council held a meeting and reversed the decision of the Board of Adjusters. At this meeting Council members Pond and Purce voted in

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5. The definitions section of the Zoning Code, §11-1-3, defines "Theater, Outdoor Drive-In" but does not define the term "motion picture" nor the term "amusement enterprise." The meaning of these latter two terms is thus unclear from the plain language of the ordinance.

favor of Tovar.

On December 9, 1975, Tovar filed[6] suit in district court after this reversal of the Board of Adjusters' decision. This suit was entitled a "Petition to Review Denial of Variance" and was filed pursuant to the Idaho Local Planning Act.[7] The petition charged

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6. This first suit was filed only by the plaintiff-appellant Moore. The plaintiffs-appellants, Tovar and Moore, however, state in their complaint in this action that they jointly owned the property in question and jointly applied for both the building permit and conditional use permit. The fact that only plaintiff-appellant Moore's name appeared on the papers filed in the first suit is thus immaterial.

7. I.C.§67-6519. Permit granting process.--As part of ordinances required or authorized under this chapter, a procedure shall be established for processing in a timely manner applications for permits for which a reasonable fee may be charged. Each application for a permit required or authorized under this chapter shall first be submitted to the zoning or planning and zoning commission for its recommendation or decision. The commission shall have a reasonable time fixed by the governing board to examine the application before the commission makes its decision on the permit or makes its recommendation to the governing board. Each commission or governing board shall establish by rule and regulation a time period within which a recommendation

Joseph TOVAR and Deborah Ann Moore,
Plaintiffs-Appellants,

v.

C.G. BILLMEYER, et al., Defendants-
Respondents.

No. 12556

Supreme Court of Idaho

Feb. 28, 1978.

DONALDSON, Justice.

Plaintiffs-appellants, Joseph Tovar and Deborah Ann Moore (hereinafter collectively referred to as "Tovar" unless otherwise indicated), are the owners of property located at 250 North Main Street, Pocatello, Idaho. The defendants-respondents in this action are the City of Pocatello, the Department of Buildings Inspector, Wayne Ellis, the City Council Members of the defendant City holding office in 1975, and two present City Council members who took office in 1976 (hereinafter collectively referred to as "City" unless otherwise indicated). The

City of Pocatello into various zones, allowing certain specific uses in each zone. The property purchased by Tovar and that where Tovar previously operated the "adult bookstore and theater" is zoned "commercial central."[1] "Theaters" are not included in the list of permitted uses in this zone and through the incorporation of the permitted uses in categories b. through v. of the "commercial local" zone it would appear that some

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1. Pocatello, Idaho, Zoning Ordinance §11-2-1 (1969), adopts the Revised Zoning Schedule which outlines the specific uses allowed in each district.

COMMERCIAL CENTRAL (CC)
Permitted Uses:

a. Residential Uses:
b. All uses permitted under categories b. through and including the v of CL district, but regulated by requirements here-in.
c. Retail Stores and Business'
d. Bars or Package Liquor Stores
e. Blue Printing or Photostating
f. Automobile parking spaces required

Additional Uses: Subject to regulation by Title 11, Chapter 8, Section 1 of this Ordinance.

"theaters" are specifically excluded.[2] None of the zones in the Zoning Code specifically list indoor motion picture theaters as a permitted use. Several zones specifically list outdoor drive-in theaters as permitted uses[3] and several zones allow "amusement enterprises" as a permitted use.[4]

The City Council of Pocatello has construed the Zoning Code to provide that indoor motion picture theaters are "amusement enterprises" and are allowed

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2. Id.
COMMERCIAL LOCAL (CL)
Permitted Uses:

* * * * *
b. . . . Studios excepting Motion Pictures.
* * * * *

3. Id.
COMMERCIAL HIGHWAY (CH)
Permitted Uses:

* * * * *
h. Drive-in Theaters
* * * * *

4. Id.
COMMERCIAL HIGHWAY (CH)
Permitted Uses:

* * * * *
e. Amusement Enterprises

that the City Council had not acted as a

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or decision must be made. Whenever a governing board or zoning or planning and zoning commission grants or denies a permit, it shall specify:

(a) the ordinance and standards used in evaluating the application;

(b) the reasons for approval or denial; and

(c) the actions, if any, that the applicant could take to obtain a permit.

An applicant denied a permit or aggrieved by a decision may within sixty (60) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by sections 67-5215(b) through (g) and 67-5216, Idaho Code.

I.C.§67-5215. Judicial review of contested cases.--

* * * * *

(b) Except when otherwise provided by law, proceedings for review are instituted by filing a petition in the district court of either the county in which the hearing was had or the county in which the final decision of the agency was made, within 30 days after the service of the final decision of the agency or, if a rehearing is requested within 30 days after the decision thereon.

(c) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within 30 days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional

review board, but rather had conducted

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costs. The court may require subsequent corrections to the record and may also require or permit additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decisions by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the

the October 23 meeting like a public meeting. The petition also charged that the City Council's decision denying the conditional use permit was arbitrary and capricious and motivated by political considerations. The prayer of the petition asked the district court to review and reverse the City Council's decision and reinstate the Board of Adjusters' decision or alternatively order the City Council to issue the conditional use permit.

The Honorable George W. Hargraves,

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reliable, probative, and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

I.C. §67-5216. Appeals.--An aggrieved party may obtain a review of any final judgment of the district court or of the industrial commission or the public utilities commission under this act by appeal to the Supreme Court. The appeal shall be taken in the manner provided by law for appeals from the district court in other civil cases and from the industrial commission and the public utilities commission.

District Judge, heard this case and issued a memorandum decision on February 11, 1976. The district court determined that Tovar's petition had raised five issues generally, three of which are involved in this appeal: (1) Whether the appellant was deprived of due process of law by reason of the City Council's meeting on October 23, 1975; (2) whether the City Council had acted arbitrarily, capriciously, and in abuse of its discretion; and (3) whether classification of "theaters" as "amusement enterprises" under the zoning ordinance was unreasonable and arbitrary. The district court reversed the October 23 decision of the City Council and remanded the case to the City Council. The district court held that the procedures followed at the October 23 meeting had been improper in that the meeting had been conducted as a public hearing where new evidence was

considered rather than as a review hearing upon the evidence before the Zoning Board of Adjusters. The district court ordered the City Council to conduct another meeting following the guidelines set forth in the court's decision. The district court also addressed the remaining two issues, finding that as a matter of law the City Council had not acted arbitrarily, capriciously or in abuse of its discretion by denying the conditional use permit, and also that the classification of "theaters" as "amusement enterprises," was not unreasonable and arbitrary.

Pursuant to the district court's decision, the City Council held another meeting on March 18, 1976 to again review the October 9, 1975 decision of the Board of Adjusters. Again the City Council reversed the Board of Adjusters' decision thus denying the conditional

use permit. Tovar took no appeal from the March 18 meeting. On January 24, 1977, this suit was dismissed by order of Judge Hargraves pursuant to a motion filed by the City.

The suit which gave rise to this appeal was filed on August 5, 1976 by Tovar. This was after the second meeting of the City Council on March 18, 1976, but before the final dismissal of the first suit on January 24, 1977. Tovar's complaint sought injunctive relief, declaratory relief and damages. Tovar's prayer for relief asked the court to declare the zoning ordinances of the City of Pocatello unconstitutional and invalid, or in the alternative, to declare the ordinances inapplicable to indoor motion picture theaters, or in the alternative to declare that an indoor motion picture theater was a permitted use in the areas zoned "commercial central." The complaint

by I.C. §67-6519.

Tovar thereafter filed this suit requesting, in addition to tort damages and injunctive relief, an order declaring the Zoning Code to be unconstitutional and invalid in that it violated freedom of speech rights guaranteed by the Idaho Constitution. Tovar argues that the Zoning Code is unconstitutional because it entirely excludes theaters from the City of Pocatello or alternatively, even if theaters are permitted in the City in zones allowing "amusement enterprises," the ordinance is still unconstitutional on grounds of vagueness.

Tovar appears to attack the ordinance as it stood prior to the City Council's interpretation. Admittedly, although we do not address this issue, prior to the City Council's interpretation, the zoning ordinance either excluded indoor motion picture theaters

from the City of Pocatello or was at least somewhat ambiguous and vauge in that it did not clearly specify where indoor motion picture theaters were permitted. After the interpretation, however, wherein the Zoning Code was construed to allow indoor motion picture theaters in zones allowing "amusement enterprises," the Zoning Code did not exclude theaters from the City.

In the first suit, Tovar raised the argument that the City Council could not so interpret the Zoning Code because the interpretation was unreasonable and arbitrary. The district court ruled adversely to Tovar on this issue, holding that the City's construction was reasonable. Tovar took no appeal from this ruling and also took no appeal when the conditional use permit was denied a second time after the March 18 meeting. Without ruling on the validity or

also asked the court to declare the City Council's action of October 23, 1975 invalid and to reinstate the October 9, 1975 decision of the Board of Adjusters, to enjoin the City from initiating any action contesting that Tovar's proposed use was not in accordance or contrary to the zoning ordinance, a judgment for lost profits, attorney fees, and punitive damages. The City filed its motion for summary judgment on September 20, 1976. On January 3, 1977, the Honorable Arthur P. Oliver, sitting as district judge, entered judgment granting the City's motion for summary judgment and dismissed Tovar's complaint with prejudice.

The following is a summary of Judge Oliver's memorandum decision dismissing Tovar's complaint in the second suit. The prayer in the complaint sought no relief against the defendants-respondents Pond, Purce, and Ellis and

peremptory dismissal as to them was appropriate. Counts I, III, and IV of Tovar's complaint, which alleged a cause of action in tort because the City Council had acted arbitrarily and capriciously in denying Tovar's conditional use permit involved the same issues as the first suit before Judge Hargraves. Judge Oliver's memorandum decision was issued on December 16, 1976. At this time, the first suit before Judge Hargraves had not been dismissed. Judge Oliver would not consider issues in the second suit which duplicated issues in the first suit. Judge Oliver held that Tovar would have to "process to a conclusion" the first suit. The tort claims could not be maintained because no notice was given to the City as required by I.C. §6-906. Lastly, it was held that Tovar was premature and had no standing to question the constitutionality of the zoning ordinance because

they had not applied for a permit in any zone except the "commercial central" zone and under the ordinance a "theater" is clearly not allowed in a "commercial central" zone. Tovar appeals from this judgment. Presumably Tovar is claiming on appeal that the trial court erred in ruling as he did on each of these points.

This appeal can be disposed of by discussing three issues:

(1) Filing of notice of tort claims pursuant to I.C. §6-906;

(2) Peremptory dismissal of defendants Pond, Purce, and Ellis; and

(3) The effect of the first suit on this appeal.

I

Tovar is seeking monetary relief under the Idaho Tort Claims Act. I.C. §§6-901 et seq. Tovar did not comply with the requirements of I.C. §6-906 by presenting his claims against the City

within 120 days after his alleged cause of action arose. The district court correctly dismissed the tort counts seeking monetary damages because of Tovar's failure to meet this condition precedent. Jacaway v. State of Idaho, 97 Idaho 694, 551 P.2d 1330 (1976); Curl v. Indian Springs Natatorium, Inc., 97 Idaho 637, 550 P.2d 140 (1976).

II

Regarding the peremptory dismissal of the three defendants-respondents as to all causes of action, we hold the trial court erred. The district court held that Tovar sought no relief from these defendants. It is true that Tovar's complaint sought no monetary relief from these defendants but the complaint did seek injunctive relief. However, since we are upholding the trial court's final decision to dismiss the complaint, it was harmless error to dismiss the three

defendants prematurely.

III

We must now determine what was decided in the first suit and what effect the first suit has on this appeal.

In the first suit Tovar filed an appeal pursuant to I.C. §67-6519 asking the district court to review the City Council's decision denying the conditional use permit. Three issues were raised and argued by Tovar and addressed by the district court in this appeal: (1) whether Tovar was denied due process by reason of the procedures followed at the October 23 meeting; (2) whether the City had acted arbitrarily by denying the conditional use permit; and (3) whether the City's construction of the Zoning Code classifying "theaters" as "amusement enterprises" was reasonable. The district court reviewed the City Council's decision and determined that a

procedural error had been committed. As a consequence of this error, the case was remanded for a second hearing. The district court found that as a matter of law the City Council had not acted arbitrarily and capriciously in denying the conditional use permit. The district court also held that the City Council's interpretation of the Zoning Code was not unreasonable and arbitrary. Implicit in this ruling is a finding that the Zoning Code was not unconstitutionally vague. Tovar took no appeal from this decision of the district court.

As required by the district court's order, the City Council held a second meeting to review the Board of Adjuster's decision granting Tovar's conditional use permit. After this meeting the City Council again denied Tovar's conditional use permit. Tovar took no appeal from this decision as permitted

correctness of the district court's decision upholding the City's interpretation of the Zoning Code, we hold that Tovar is bound to this ruling because Tovar chose to litigate the issue in the earlier proceeding and failed to appeal the adverse ruling by the district court. In Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949), this Court stated that "a judgment is conclusive as between the parties and their privies on all issues which were (or should have been) litigated in the action." Id. at 128, 212 P.2d 1034; accord, Treece v. Treece, 84 Idaho 457, 373 P.2d 750 (1962).

The decision of the district court dismissing Tovar's complaint is therefore affirmed.

No attorney's fees allowed on appeal. Costs to respondents.

SHEPARD, C. J., McFADDEN and

APPENDIX J

Opinion of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Wayne Ellis, and the City of Pocatello, an Idaho Municipal Corporation, No. 77-2929, 609 F.2d 1291 (9th Cir., Nov. 6, 1979).

. . . J-1 through J-13.

(Reference: Petition for Writ of Certiorari, at pp. 3, 22, and 29.)

Joseph TOVAR and Deborah Ann Moore,
Plaintiffs-Appellants,

v.

C.G. BILLMEYER, et al., Defendants-
Appellees.

No. 77-2929.

United States Court of Appeals,
Ninth Circuit.

Nov. 6, 1979.

Rehearing Denied Jan. 10, 1980.

Appeal from the United States District Court for the District of Idaho.

Before TRASK and SNEED, Circuit Judges, and SOLOMON*, District Judge.

SNEED, Circuit Judge:

Appellants Tovar and Moore appeal from a dismissal of their action against the appellees by the district court. The dismissal was based on a version of the abstention doctrine that the district

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* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

court derived from Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); and Juidice v. Vail, 430 U.S. 327, 97 S. Ct. 1211, 51 L.Ed.2d 376 (1977). We hold that the district court erred. We reverse and remand to the district court to enable the appellants to present their federal claims for complete resolution before a federal court.

Our jurisdiction rests on 28 U.S.C. §1291.

I. FACTS

This case was commenced on December 22, 1975 in federal district court and it sought injunctive and declaratory relief as well as damages. It sprang from appellants' efforts to operate an adult bookstore and theater in Pocatello, Idaho, at a location they had purchased

in September, 1975. Although appellants obtained a conditional use permit from the City Board of Adjustment, the Pocatello City Council, in October, 1975, reversed the Board's decision and refused to issue the permit. This action by the Council was challenged in a suit in state court filed by appellants in early December, 1975. It sought to set aside the Council's action and was pursuant to a specific state statute authorizing limited judicial review of zoning decisions. The state court in February, 1976 vacated the Council's action and remanded to the Council for further consideration and decision. The Council, in March, 1976, again voted to deny the permit. No appeal from that decision was taken. However, the state court had retained jurisdiction of the matter following its remand.

In the following month, April, 1976,

in January, 1977. Approximately six months later, June, 1977, the present federal action was dismissed on the basis of an abstention doctrine derived in the manner described above. This dismissal constitutes error.

II. ABSTENTION UNDER COLORADO RIVER WATER CONSERVATION DISTRICT, YOUNGER, AND JUIDICE

Under the Supreme Court's teaching in Colorado River Water Conservation District v. United States, supra, deferral by a federal court to a state court rests, as the court below indicated, on "considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" 424 U.S. at 817, 96 S.Ct. at 1246. This is a basis distinct from that established for abstention by either Railroad Commission v. Pullman Co., supra, or Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098,

87 L.Ed. 1424 (1943), or Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L. Ed.2d 669 (1971), and "considerably more limited than the circumstances appropriate for abstention." 424 U.S. at 818, 96 S.Ct. at 1246. The focus under Colorado River Water Conservation District is upon whether exceptional circumstances exist that indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results. Where these consequences are a likely result of concurrent jurisdiction, it is proper to consider dismissal of the federal proceeding.

Dismissal, however, is proper only when, in the judgment of the court, these consequences outweigh in a given situation the "unflagging obligation" of the federal courts to exercise the

the district court in this case entered an order granting appellees' motion to abstain and directing that the case be held in abeyance pending further state court proceedings. Apparently this abstention was pursuant to Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); see Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979). The district court in its order noted that appellants had filed a "Reservation of Constitutional Questions" in the state action which reservation, the court observed, "only secures for plaintiff his right to return to federal court should the state court not resolve the federal questions to his satisfaction." C.T. 318. The district court's abstention order indicated that all appellants' claims, both state and federal, could be tried and heard in the state court

proceeding.

Very likely this indication moved the appellants to initiate, in August 1976, a second state court proceeding in which monetary and injunctive relief was sought. In December, 1976, this action was dismissed by the Idaho District Court on the grounds (1) that challenges to the City Council's action were still pending in the first state court proceedings, (2) that the failure to file monetary claims with the City precluded recovery of damages, and (3) that claims for injunctive relief were premature. This dismissal was appealed and the Supreme Court of Idaho affirmed it in Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (1978).

Only two additional defeats by the appellants remain to be related. The first was the dismissal of appellants' first state court action with prejudice

jurisdiction given to them. 424 U.S. at 817-18, 96 S.Ct. 1236. This obligation is particularly weighty when those seeking a hearing in federal court are asserting, as the appellants are here, their right to relief under 42 U.S.C. §1983. Under such circumstances conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures. While we need not conjecture whether there exist circumstances that could outweigh the "unflagging obligation" in section 1983 cases, we are convinced that they do not exist in this case.

Appellants from the early days of their dispute with the City have sought to have their federal claims heard in a federal court. To this day they have been unsuccessful despite their explicit

reservation of constitutional issues which the district court, in its original abstention decision recognized would preserve the appellants' "right to return to the federal court should the state court not resolve the federal questions to his satisfaction." It would be possible to argue that the district court's dismissal, of which the appellants here complain, is contrary to the law of the case established by its earlier recognition of the appellants' right to return to the federal court.

Even if not controlling under the law of the case doctrine, this reservation and its recognition clearly serves to rebut any allegation that the appellants "freely and without reservation submitted their federal claims for complete and final resolution by the state courts." See England v. Louisiana Medical Examiners, 375 U.S. 411, 419, 84 S.Ct. 461,

11 L.Ed.2d 440 (1964). The absence of such a submission preserves the right to return to the federal court.

The district court in this case applied to Colorado River Water Conservation District a gloss derived from Younger v. Harris, supra, and Juidice v. Vail, supra. The result was the following statement by the district court:

> "It appears to this Court that the plaintiffs in this action had every opportunity to present their entire claims in Idaho state courts, where they chose to first commence their grievance, and to which plaintiffs were referred by the Order of Abstention entered by this Court." (C.T. 405.)

Construed reasonably, this appears to be saying that resort to federal courts for the relief provided by 42 U.S.C. §1983 is barred when the plaintiff (1) initially seeks relief in a state court and (2) has the opportunity to raise all his claims, both state and federal, in the state court. This is not the law. England

does not so hold. A free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court.

In theory a case can be made to require those deprived of constitutional rights by states and their officials acting under color of state law to seek redress in state courts initially with review of state court action by federal courts limited to scrutiny for egregious errors. The law, however, is otherwise. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy. . . ." Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed. 2d 492 (1961), Monell v. Department of Social Services, 436 U.S. 658, 701, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which overruled Monroe v. Pape with regard to

municipal immunity in section 1983 cases, did nothing to undermine the vitality of this general principle. Neither Younger v. Harris, supra, nor Juidice v. Vail, supra, has altered that law. Younger merely proscribes federal courts from enjoining a criminal prosecution in progress in the absence of a showing of either bad faith on the part of, or harassment by, the state prosecutor, or some other unusual circumstance such as prosecution under a state statute "flagrantly and patently violative of express constitutional prohibitions. . . ." Huffman v. Pursue, 420 U.S. 592, 611, 95 S.Ct. 1200, 1212, 43 L.Ed.2d 482 (1975). Juidice only extended Younger to preclude the enjoining by a federal court of an ongoing contempt proceeding in state courts pursuant to state law which was not patently unconstitutional.

It is true that the Supreme Court

in Juidice spoke somewhat expansively of the notion of comity, noting that it was the principle on which Younger and Huffman rested, and emphasized that those seeking federal court intervention in Juidice had "an opportunity to present their federal claims in the state proceedings." 430 U.S. at 337, 97 S.Ct. at 1218. To utilize these observations, as perhaps the district court did, to justify its dismissal of appellants' federal suit is to read them to undermine both Monroe v. Pape, supra, and England v. Louisiana Medical Examiners, supra. We do not believe this was the holding of Juidice v. Vail.

We therefore reverse the district court's dismissal and remand this case to the district court for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

APPENDIX K

Opinion of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Donna Boe; Wayne Ellis; and The City of Pocatello, an Idaho Municipal Corporation, No. 82-3258, 721 F.2d 1260 (9th Cir., Dec. 15, 1983).

. . . K-1 through K-29.

(Reference: Petition for Writ of Certiorari, at pp. 3, 10, 23, and 59.)

Joseph TOVAR and Deborah Ann Moore,
Plaintiffs-Appellants,

v.

C.G. BILLMEYER; et al., Defendants-
Appellees.

No. 82-3258.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 3, 1983.

Decided Dec. 15, 1983.

Appeal from the United States District Court for the District of Idaho.

Before GOODWIN, WALLACE and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

The City Council of Pocatello, Idaho made two zoning decisions that prevented plaintiffs from operating their adult theater and bookstore at a newly acquired site. Plaintiffs challenged the City's action in federal district court, and the district judge granted summary judgment for defendants. The question presented on appeal is whether summary

judgment is proper in a case where the City's zoning decisions may have been motivated by a desire to suppress protected first amendment expression. We hold that summary judgment is inappropriate and reverse.

FACTS

In 1972 plaintiffs Joseph Tovar and Deborah Ann Moore opened an adult bookstore and theater in a rented building at 135 South Main Street in downtown Pocatello, Idaho. The Pocatello zoning code provides that only those uses specifically mentioned in the permitted use list for each geographical zone are proper. No permitted use list for any geographical zone, including the Commercial Central zone where the theater and bookstore were located, mentioned movie theaters (other than drive-ins) as an allowable use. Nonetheless, plaintiffs obtained city building permits and

licenses authorizing the operation of the theater and bookstore each year from 1972 through 1975.

In August 1975 plaintiffs learned that they would soon be evicted from their rented location at 135 South Main Street. Plaintiffs then purchased on August 28, 1975 another building as a home for the adult theater and bookstore. That building was located at 250 North Main Street, several blocks from plaintiffs' previous location and within the same Commercial Central zoning district.

Before plaintiffs had an opportunity to apply for the required city permits and licenses, the Pocatello City Council, without notice, held a special meeting on September 2, 1975. The meeting was attended by defendant Billmeyer, Pocatello's mayor, and defendants Morgan, Roskelley, Evans and Boe, all members of the City Council. Plaintiffs allege that the

purpose of the meeting was to find a way to prevent the reopening of the adult theater. According to plaintiffs' version of the meeting, the City Council ordered the building inspector to deny a permit when plaintiffs applied for one. On September 10, 1975, Pocatello's building inspector, defendant Ellis, denied plaintiffs' request for a permit to operate the adult theater in the new building.

Plaintiffs also allege that, at its September 2nd meeting, the City Council for the first time adopted an interpretation of the term "amusement enterprises" in the zoning code. This term had always been in the code, which took effect in February 1969. Under the new interpretation of "amusement enterprises," indoor motion picture theaters would be allowed in the Commercial Highway zone, but not in the Commercial Central zone

where plaintiffs' theater would be located. Plaintiffs argue that the only reason the Council adopted its interpretation of "amusement enterprises" was because the effort to exclude the adult theater from Pocatello could not have succeeded unless indoor theaters were allowed somewhere in the City. Plaintiffs contend that, in the absence of such an interpretation, the zoning code would be patently unconstitutional because it completely excluded indoor movie theaters as legitimate uses of property anywhere in Pocatello.

Following the building inspector's September 10th denial of the permit, plaintiffs asked the Pocatello Board of Adjustments to grant a conditional use permit authorizing the adult theater's operation at the newly acquired site.[1]

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1. Under the newly adopted interpretation of the zoning code, no such permit would have been required for a site located in the Commercial Highway zone.

The Board held an extensive public hearing on the probable impact of an adult theater at the new location--including potential traffic and parking problems. On October 8, 1975, the Board of Adjustments voted to grant the conditional use permit for the adult theater[2] as requested by plaintiffs.

The Board's decision was quickly appealed to the City Council by the Pocatello Downtown Merchants Association. On October 23, 1975, less than two weeks before defendant council members Evans, Boe and Roskelley were to stand for reelection, the City Council held a public hearing and voted to reverse the Board of Adjustments' decision and deny the conditional use permit.

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2. The parties apparently agree with the opinion of the Pocatello City Attorney, expressed at the Board of Adjustments hearing, that the adult bookstore is a permitted use under the zoning ordinance.

The City Council's refusal to grant the conditional use permit began a tangled series of protracted legal battles in both federal and state court. Plaintiffs first challenged the Council's decision in a state court suit filed in December 1975. In February 1976 the state court vacated the Council's decision because it was made after a public hearing where new evidence was considered rather than following a limited hearing reviewing only the evidence presented to the Board of Adjustments. The case was remanded to the City Council for further consideration. On March 18, 1976, the Council again voted to reverse the Board of Adjustments' decision. Plaintiffs did not appeal that ruling.

While the state court case was pending, plaintiffs brought the present action in district court seeking injunctive and declaratory relief as well as damages.

The federal district judge decided to abstain because all of plaintiffs' claims, both state and federal, could be tried and heard in the state court proceeding. In response to this decision, plaintiffs filed a second state court suit in August 1976 seeking both monetary and injunctive relief. In December 1976, the second state action was dismissed by the Idaho state court primarily because plaintiffs' allegations could be decided in the first state court case, which was still pending at the time. The Idaho Supreme Court affirmed this dismissal. Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (1978).

When the first state court case was finally concluded,[3] the federal district court dismissed plaintiffs' present

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3. The state court ultimately decided, as a matter of law, that the City Council had not acted arbitrarily or abused its discretion by interpreting "amusement enterprises" to include indoor motion picture theaters.

action based on the abstention doctrine. We reversed that decision in Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1980), because plaintiffs had not made an unreserved submission of all their federal claims to the state court and therefore could not be barred from returning to federal court with those claims.

After we remanded the case to federal district court, both plaintiffs and defendants moved for summary judgment. The district judge granted defendants' summary judgment motion. Plaintiffs now appeal that decision.

DISCUSSION

I. STANDARD OF REVIEW

Summary judgment is proper only if there are no genuine issues of material fact in dispute. Fed.R.Civ.P. 56(c); Peacock v. Duval, 694 F.2d 644, 645 (9th Cir. 1982); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 882 (9th Cir.

1980). In reviewing a summary judgment, we view the evidence in a manner most favorable to the losing party. Gaines v. Haughton, 645 F.2d 761, 769 (9th Cir. 1981), cert. denied, 454 U.S. 1145, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982).

We have previously recognized that summary judgment is usually inappropriate in cases dealing with potentially unconstitutional motivations. See, e.g., Peacock, 694 F.2d at 647, 648; Mabey v. Reagan, 537 F.2d 1036, 1044 n.9 (9th Cir. 1976); cf. Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983) (although "questions of intent" may not "be amenable to disposition on summary judgment," summary judgment was affirmed because the facts are "largely undisputed"). Because evidence concerning motive is almost always subject to a variety of conflicting interpretations, a full trial on the merits is normally the only way to separate

permissible motivations from those that merely mask unconstitutional actions.

II. PLAINTIFF'S FIRST AMENDMENT CLAIMS

We have no difficulty concluding that the evidence presented to the district court is insufficient to warrant summary judgment on behalf of defendants. We begin with the settled premise that zoning decisions may not constitutionally be made for the purpose of restricting protected first amendment speech, including that which is sexually explicit.[4]

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4. Defendants have never alleged that the entertainment offered at plaintiffs' theatre is obscene under Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), or otherwise unprotected by the first amendment. It is, of course, clear that free expression intended for entertainment purposes is generally entitled to the full panoply of first amendment protections. See, e.g., Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65, 101 S.Ct. 2176, 2180-81, 68 L.Ed. 2d 671 (1981) (first amendment safeguards apply to live nude dancing because "[e]ntertainment, as well as political and ideological speech, is protected."); Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948) ("The line between the informing and the entertaining is too elusive for the protection of th[e] basic right [of free speech].").

See generally Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1347 (9th Cir. 1982). Consequently, federal courts strictly scrutinize zoning decisions that impinge on first amendment rights. See generally Young v. American Mini Theatres, 427 U.S. 50, 56 & n. 12, 96 S.Ct. 2440, 2445 & n. 12, 49 L.Ed.2d 310 (1976); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); Ebel v. City of Corona, 698 F.2d 390, 392 (9th Cir. 1983). Cf. Harper v. Virginia Board of Elections, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed. 2d 169 (1966). Under the strict scrutiny standard, zoning decisions aimed at regulating unprotected activities that incidentally limit free expression are valid only if justified by a compelling state interest. Young, 427 U.S. at 56 n. 12, 96 S.Ct. at 2445 n. 12; Ebel, 698 F.2d at 392.

Thus, summary judgment is proper in this case only if, viewing the evidence in the light most favorable to plaintiffs, it can be said as a matter of law that the purpose of the zoning decisions was to serve a compelling governmental interest unrelated to the suppression of free expression. Kuzinich, 689 F.2d at 1348-49. In addition, the incidental restriction on first amendment freedoms can be "no greater than is essential to the furtherance" of the governmental interest. Young, 427 U.S. at 79-80, 96 S.Ct. at 2457 (Powell, J., concurring). Under this legal framework and the facts presented here, summary judgment for defendants is inappropriate.

To begin with, the deposition testimony of one of the principal defendants indicates that the primary purpose of the City Council's zoning decision was to prevent plaintiffs' theater from operating in

Pocatello. Defendant Billmeyer's deposition testimony indicates that he, in his capacity as Pocatello's mayor, called the September 2nd Council meeting "to see what the City Council could do about getting the [plaintiffs'] Gallery Theater out of Pocatello." And defendant Ellis, the City's building inspector, candidly admitted in deposition testimony that he was instructed by Mayor Billmeyer to deny the building permit when plaintiffs applied for one. Ellis followed these instructions eight days later when plaintiffs' application was finally submitted.

In addition to these statements, the extraordinary nature of the City Council's decision-making process also casts suspicion on its motives. The September 2nd meeting was held before plaintiffs had even applied for a building permit for the theater. City Manager Charles Moss, who attended that meeting, recalled that

the Council's purpose was to decide whether or not plaintiffs' theater would be permitted to operate at its new location. Defendant Councilwoman Boe testified that she could not "recall any other time" during her tenure on the Council when a meeting was held to deny a building permit before an application had been submitted. Indeed, Boe could not "think of any" other example where the Council instructed the City's building inspector to deny a permit application prior to its submission. Defendant Councilman Evans, who did not attend the September 2nd meeting, also testified that he could recall no other instances where the Council had instructed that a permit be denied prior to an application and that, under most circumstances, it would be improper for the Council to act in such a way.

Finally, the deposition testimony of several defendants indicates that the

September 2nd meeting was the first time in the zoning code's six year history that the Council had adopted an interpretation of the term "amusement enterprises" that included indoor movie theatres. This testimony supports plaintiffs' allegation that the new zoning interpretation was specifically directed at their theatre.

When faced with a similar set of circumstances in Ebel v. City of Corona, 698 F.2d at 390, we did not hesitate to find that genuine issues of material fact existed and that plaintiff was entitled to a preliminary injunction. In Ebel, the plaintiff argued that the "real purpose" of the City's zoning ordinance restricting sellers of "sex-oriented material" was to "obstruct the exercise of her First Amendment rights." Id. In Ebel, as in this case, the plaintiff operated the only adult-oriented business in town. Id. In Ebel, as here, there

was an explicit statement by a City official that the goal of the ordinance was to remove the plaintiff's business from the City. Id. And, just as in the present case, there were other indications in Ebel that the City's zoning decision was directed specifically at the plaintiff. Id. Under these circumstances, we found that "[t]he record provides enough evidence in support of [plaintiff's first amendment] claim to make the question one that does not lend itself to summary disposition. The claim presents fair ground for litigation." Id.

We reached a similar result in Kuzinich v. County of Santa Clara, 689 F.2d at 1345, where the Board of Supervisors enacted an emergency amendment to the zoning ordinances that made the operation of the plaintiff's adult business at their present locations illegal. 689 F.2d at 1347. Because "there was . . . evidence

from which it might be inferred that the basic purpose [of the zoning decision] was to control" the exercise of protected pornographic expression, 689 F.2d at 1348, we held in Kuzinich that summary judgment for the defendants was inappropriate.

A zoning decision that has as a purpose the restriction of protected first amendment freedoms cannot survive strict constitutional scrutiny. From the evidence presented in this case, it is impossible to conclude that there is no genuine material dispute concerning the reasons motivating the Pocatello City Council's actions. Indeed, there appears to be substantial evidence--most of it provided by defendants themselves--that the City Council took the unusual steps of adopting a new interpretation of the zoning ordinance, and ordering that a building permit be denied before it was even applied for, in order to prevent

plaintiffs from exercising their first amendment rights. Plaintiffs must be given the opportunity to explore fully the Council's motivations at trial.

Plaintiffs do not question the City Council's legal authority to interpret provisions of the zoning ordinance or to deny conditional use permits. What plaintiffs do allege is that the Council's zoning decisions had as a purpose the restriction of first amendment rights.[5] Defendants are of course free to prove at trial that a compelling governmental interest, rather than a desire to curtail free expression, motivated their zoning

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5. We do not suggest that the Idaho state court was incorrect in concluding that the term "amusement enterprises" was susceptible to an interpretation that included movie theaters. Nor do we disagree that, as a matter of state law, the interpretation was a reasonable one. See note 3, supra. The issue here, however, is whether the Council's decision to interpret "amusement enterprises" for the first time at the September 2nd meeting was unconstitutionally motivated.

decisions. See, e.g., Young, 427 U.S. at 56 n. 12, 96 S.Ct. at 2457 n. 12.

In granting summary judgment, the district court relied in part on the hearing the City Council held to consider the application for a conditional use permit. At this hearing the Council purportedly denied the application based on traffic and parking problems. However, if it is true, as plaintiffs allege, that the City Council actually made its decisions at the closed-door September 2nd meeting, then subsequent Council hearings and findings on potential traffic and parking problems are, at the least, suspect. We note that the first extensive hearing on the potential problems presented by plaintiffs' theater was conducted by the Board of Adjustments, and that Board decided that plaintiffs should be granted a conditional use permit. Only after the Board of Adjustments made its

decision did the City Council--which plaintiffs allege had already decided the issues on September 2nd--hold its October 23, 1975 pre-election meeting to solicit the views of concerned individuals. Such a post hoc attempt to rationalize a previous decision is certainly an important factor in evaluating the Council's motives. See, e.g., Peacock, 694 F.2d at 648.

In any event, the justifications offered by the City Council must consist of more than "[c]onclusions alone." Kuzinich, 689 F.2d at 1348. Rather, there must be "a factual basis for the . . . Council's conclusion that this kind of [zoning] restriction will have the desired effect." Young, 427 U.S. at 71, 96 S.Ct. at 2452-53 [footnote omitted].

Even assuming that the desire to limit traffic and parking problems motivated the City Council's actions, the law

requires that zoning decisions "restricting first amendment rights be narrowly drawn." Kuzinich, 689 F.2d at 1348; see also Schad v. Borough of Mount Ephraim, 452 U.S. 61, at 68, 101 S.Ct. 2176, at 2182, 68 L.Ed.2d 671 ("when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."); Young, 427 U.S. at 56 n. 12, 96 S.Ct. at 2445 n. 12; Ebel, 698 F.2d at 393. Consequently, the City must show that plaintiffs' theater has a "different impact upon traffic . . . than other kinds of businesses have," Kuzinich, 689 F.2d at 1348, and that "an ordinance directed at traffic" or parking would not accomplish what the restriction on first amendment freedoms was intended to accomplish. Id.

The district court must therefore determine at trial whether a motivating

factor in the zoning decision was to restrict plaintiffs' exercise of first amendment rights. Ebel, 698 F.2d at 393. If a motivating reason for the Council's actions was to prevent the theater from operating, then the zoning decision would violate the first amendment. Purposeful attempts to suppress protected expression are unconstitutional.[6] Id; see also Kuzinich, 689 F.2d at 1348-49. On the other hand, defendants' case will depend on proof that the zoning decisions were motivated by a desire to further a compelling governmental interest unrelated to the suppression of free expression. As we cautioned in Ebel, "the district

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6. In light of our decision, we express no view on whether the City Council's actions may also have violated the fourteenth amendment's equal protection clause. See, e.g., Ebel, 698 F.2d at 393 ("If . . . the real purpose of the . . . ordinance was to run [plaintiff's] adult bookstore out of town, then the ordinance would violate . . . equal protection (because it was aimed at [plaintiff])").

court should make factual findings on the validity of the city's assertions of harm [to be prevented by zoning] and then closely scrutinize the [zoning] ordinance's relationship to prevention of the alleged harms." Ebel, 698 F.2d at 393; see also Young, 427 U.S. at 56 n. 12, 96 S.Ct. at 2445 n. 12.[7] Finally, in order for defendants to prevail, the court must find that other actions, such as

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7. Ebel deals with a much simpler question in a manner that is consistent with the test we have applied. In Ebel we thought it was enough to note that either the ordinance in question was adopted in order "to run [the] adult bookstore out of town" or it was not. We did not find it necessary to discuss the more complicated question of the mixed motives that are frequently present in first amendment cases. Unfortunately, most first amendment cases are not as simple as Ebel. Accordingly, it will usually be necessary to apply the "motivating factor" test that we apply here. However, the simpler Ebel test will be adequate in those cases where there is clearly only a single purpose motivating the legislative action and the court is confronted with an all or nothing question--whether, in fact, there was an intent to affect first amendment rights; if the answer is yes, the improper "real purpose" has been established.

ordinances dealing directly with parking and traffic, could not have prevented the harms involved. Kuzinich, 689 F.2d at 1348.[8]

---

8. Defendants suggest two alternative grounds for summary judgment. Both of these grounds were presented to the district court but were not mentioned or discussed in its memorandum disposition. Neither is sufficient to justify summary judgment for defendants.

First, defendants contend that res judicata bars plaintiffs' present action because the same issues have been litigated in state court. This court has already rejected this argument. In Tovar v. Billmeyer, 609 F.2d at 1293-94, we held that "[a] free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court." And, as we noted in Tovar, plaintiffs have consistently made an "explicit reservation of constitutional issues." Id. at 1293. Defendants' res judicata argument is thus without merit.

Second, defendants argue that they are absolutely immune from suit because they were acting in either a legislative or a judicial capacity. There is considerable doubt that defendants can properly characterize their actions as either legislative or judicial. In Kuzinich, for example, we held that a Board of Supervisors' order to County counsel to institute actions to abate plaintiff's adult-oriented businesses "was not a legislative act, but rather an executive one." 698 F.2d at 1350. Here, the record is far from complete as to precisely what action the Council took and in what capacity those actions were taken. Accordingly, this issue is not appropriate for resolution by summary judgment.

CONCLUSION

Because genuine issues of material fact remain to be resolved, the district court's grant of summary judgment for defendants is reversed and the case is remanded for trial on the merits.

WALLACE, Circuit Judge, concurring:

I concur in the result of the panel's decision. Under the controlling precedent in this circuit, the district court's granting of the defendants' summary judgment motion was improper. Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983). I cannot agree, however, with the majority's formulation of the legal standard to be applied by the district court on remand. In Ebel, we held that an ordinance was unconstitutional if its "real purpose" was to obstruct the exercise of protected first amendment rights. 698 F.2d at 393. Instead of following that clear and precise standard, the majority

states that the district court must establish whether "a motivating factor" for the zoning decision was to restrict the exercise of first amendment rights. I see no reason for the refusal to follow the Ebel standard, especially without reconsideration en banc.

The majority attempts to overcome this deficit by limiting Ebel. See Majority Opinion at 1267 n. 7. It would be difficult to imagine a case with facts more similar to Ebel than this one. Both cases involved the use of restrictive zoning in an attempt to close the only adult-oriented business in town. The evidence of improper motivation that is recited in the majority opinion is clearly adequate to support a reversal of the summary judgment under Ebel's "real purpose" standard. There is simply no need to formulate the new test set forth in the majority opinion.

Moreover, the majority's attempt to distinguish Ebel implicitly vitiates the usefulness of the test we developed in that case. According to the majority, the Ebel test will be used only in cases involving a single purpose for the challenged legislative action. By the very nature of legislative actions, however, it seems inevitable that there will always be more than a single purpose for any action of a legislative body. If the clear, Ebel standard is inapplicable to the present case, I cannot conceive of a case to which it would apply.

Because I believe our court is bound by Ebel and because I cannot approve the needless formulation of new legal tests to be applied in cases that can be resolved under the existing precedent of this court, I do not join in the majority's opinion. In addition, I fear that application of the majority formulation

will result in confusion, and could lead to incorrect results when a combination of motivating factors is involved in the formulation of government actions that impact on constitutional rights.

APPENDIX L

Judgment of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Donna Boe; Wayne Ellis; and The City of Pocatello, an Idaho Municipal Corporation, No. 82-3258 (DC CV 4-75-59 MJC), filed and entered Dec. 15, 1983.

. . . L-1 through L-2.

(Reference: Petition for Writ of Certiorari, at p. 3.)

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[FILE STAMP]

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs-Appellants,	No. 82-3258
vs.	DC CV 4-75-59 MJC
C.G. BILLMEYER; MELVIN MORGAN; F.W. "BILL" ROSKELLEY; JOHN EVANS; DONNA BOE; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho Municipal Corporation, Defendants-Appellees.	

APPEAL from the United States District Court for the BOISE District of IDAHO.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the BOISE District of IDAHO and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District

Court in this Cause be, and hereby is reversed and remanded.

Filed and entered December 15, 1983.

APPENDIX M-1

Petitioners' "SUGGESTION FOR EN BANC CONSIDERATION", filed on or about Dec. 22, 1983.

(Reference: Petition for Writ of Certiorari, at p. 4, 24, 25, and 60.)

. . . M-1 through M-4.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH TOVAR and DEBORAH ANN MOORE, Appellants, vs. C.G. BILLMEYER; MELVIN MORGAN; F.W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho Municipal Corporation, Appellees.	C.A. NO. 82-3258 D.C. No. CV 4-75-59 MJC IDAHO (Boise) SUGGESTION FOR EN BANC CONSIDERATION

Pursuant to and consistent with the Federal Rules of Appellate Procedure, including Rule 35 thereof, the Appellees respectfully suggest and request that

this entire Circuit hear this matter en banc.

Consistent with the suggestion of Circuit Judge Wallace, concurring, in the Opinion filed December 15, 1983 in this matter, Appellees respectfully request the Circuit address en banc the refusal of the opinion authored by Circuit Judge Reinhardt to follow the standard formulated in Ebel v. City of Corona, 698 F.2d 390 (9th 1983). See concurring opinion, page 1.

It is respectfully submitted that Judge Wallace was correct in suggesting: "I see no reason for the refusal to follow the Ebel standard especially without reconsideration en banc."

DATED this 22nd day of December, 1983.

Respectfully submitted,

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APPENDIX M-2

Petitioners' "SUPPLEMENTAL SUGGESTION, PETITION FOR REHEARING, and REQUEST FOR HEARING EN BANC", filed on or about Jan. 31, 1984.

(Reference: Petition for Writ of Certiorari, at p. 4, 24, 25, and 60.)

. . . M-5 through M-12.

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FOR THE NINTH CIRCUIT

JOSEPH TOVAR and DEBORAH ANN MOORE, Appellants, vs. C.G. BILLMEYER; MELVIN MORGAN; F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho Municipal Corporation, Appellees.	C.A. No. 82-3258 D.C. No. CV 4-75-59 MJC IDAHO (Boise) SUPPLEMENTAL SUGGESTION, PETITION FOR REHEARING, and REQUEST FOR HEARING EN BANC

I. INTRODUCTION

The panel Opinion was filed December 15, 1983.

Appellees submitted over date of

December 22, 1983, their request by Suggestion For En Banc Consideration following which this Court retained jurisdiction. At the time of such Suggestion, within the confines of the three defined conditions of purposes promulgated by this Court governing petitions for rehearing (FRAP 40), the Appellees were then precluded from certifying within such three purposes for a rehearing petition. However, in its opinion announced January 23, 1984, the Supreme Court of the United States in its Opinion in Ethel D. Migra, Petitioner v. Warren City School District Board of Education, et al., ___ U.S. ___, 52 LW 4151, No. 82-738, did define a change in the law otherwise defined in the panel decision in this cause which occurred after the case was submitted and thus was not available to have been embraced within the panel decision which was

filed December 15, 1983. The panel opinion now contains a conflict in law which was not correctly addressed in the opinion, or, if addressed, now so construes an earlier decision of this circuit and the recent Supreme Court Opinion in conflict with the panel decision herein.

In counsel's judgment, one or more of the three conditions described by this court as to the Purposes do now exist as defined in the above Points and the discussion of change in law below.

II. DISCUSSION OF CHANGE IN LAW AND APPARENT CONFLICT NOT ADDRESSED IN PANEL DECISION.

As to the opinion herein of December 15, 1983, authored by Circuit Judge Reinhardt, attention is called to footnote 8, id. 16, and in regard to the second paragraph discussion on res judicata in which, in spite of an earlier filing by the appellants as plaintiffs in a state court action prior to the

maintenance of the present federal action, and the continuation of the proceedings in state courts to conclusion in state courts, the second state court action being concluded through the Supreme Court of the State of Idaho, the panel opinion herein concluded: "Defendants res judicata argument is thus without merit."

The recent opinion of the Supreme Court delivered by Justice Blackmun, to which there was no dissent, in its footnote 7 to the proposition that to avoid the effect of res judicata, defined as "claim preclusion," which refers "to the preclusive effect of a judgment in foreclosing relitigation of matters that should have been raised in an earlier suit," (id. footnote 1, paragraph 2) that plaintiffs, upon a failure to show that they could not have adjudicated the federal claims had they presented them

in the original suit in state court, must, as an alternative, show that they "obtained a federal forum for . . . the . . . federal claim by litigating it first in a federal court." See the sentence from which footnote 7 refers in the opinion. Thus, had the appellants here wished to preserve an opportunity to present their claims in the federal court these plaintiffs need first file in the federal forum and, following an abstention, inform the state court of an intention to return to the federal court on the federal claims following litigation of the state claims in state court. See footnote 7, Migra.

In explanation, the United States Supreme Court stated:

> "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. In Allen v. McCurry, 449 U.S. 90

(1980), this Court said:

> 'Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. . . .' Id., at 96.

This principal was restated in Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982):

> 'Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.' Id., at 466."

The Supreme Court noted that the Ninth Circuit Court had already decided that claim preclusion is applicable to a Section 1983 action citing Scoggin v. Schrunk, 522 F.2d 436 (9th 1975) in its footnote 6, and in this regard stated:

> "The Court in Allen left open the possibility, however, that the

> preclusive effect of a state-court judgment might be different as to a federal issue that a §1983 litigant could have raised but did not raise in the earlier state-court proceeding."
>
> * * *
>
> "Petitioner suggests that to give state-court judgments full issue would enable litigants to bring their state claims in state court and their federal claims in federal court, thereby taking advantage of the relative expertise of both forums. Although such a division may seem attractive from a plaintiff's perspective, it is not the system established by §1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources."

In light of this decision recently announced on January 23, 1984, by the United States Supreme Court this Court's attention to the construction of law which occurred after the case was submitted and was not available to the

panel and the apparent conflict which results should the panel decision stand, it is respectfully submitted that this part of the decision, in addition to the refusal of the majority of the panel to follow the Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983) standard, should be heard en banc.

DATED this 31st day of January, 1984.

RESPECTFULLY SUBMITTED.

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APPENDIX M-3

Petitioners' "Motion To Enlarge The Time For Filing And To Late File The SUPPLEMENTAL SUGGESTION, PETITION FOR REHEARING, and REQUEST FOR HEARING EN BANC", filed on or about Feb. 3, 1984.

(Reference: Petition for Writ of Certiorari, at p. 4, 24, 25, and 60.)

. . . M-13 through M-17.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH TOVAR and DEBORAH ANN MOORE, Appellants, vs. C.G. BILLMEYER; MELVIN MORGAN; F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho Municipal Corporation, Appellees.	C.A. No. 82-3258 D.C. No. CV 4-75-59 MJC IDAHO (Boise) Motion To Enlarge The Time For Filing And To Late File The SUPPLEMENTAL SUGGESTION, PETITION FOR REHEARING, and REQUEST FOR HEARING EN BANC

The Appellees, having lodged Supplemental Suggestion, Petition For Rehearing, and Request For Hearing En Banc, served over date of January 31, 1984, respectfully move that the time

for filing same be enlarged and move to late file such Supplemental Suggestion, Petition for Rehearing, and Request For Hearing En Banc, for and because of the reasons stated in the Introduction to said Supplemental Suggestion, Petition For Rehearing, and Request For Hearing En Banc, which is hereby referred to by reference. These reasons are essentially the impossibility to have earlier raised the points necessary to secure and maintain uniformity of the decisions of this Court and the decisions of the Supreme Court of the United States and to raise the question of importance presented as stated in the Supplemental Suggestion, Petition For Rehearing, and Request For Hearing En Banc.

The panel Opinion herein was filed December 15, 1983. The Opinion in Ethel D. Migra, Petitioner v. Warren City School District Board of Education, et

al., ___ U.S. ___ 52 LW 4151, No. 82-738, was delivered by the Supreme Court on January 23, 1984. Therefore, the conflicts with this decision and the panel Opinion could not have been raised in the fourteen days following December 15, 1983, otherwise provided by Rule 40, FRAP. Appellees did submit their request by Suggestion For En Banc Consideration within the fourteen days, having so submitted same December 22, 1983, the seventh day following the panel Opinion. Having submitted same, this Court retained jurisdiction. Such Opinion in Migra did define the law otherwise then as defined in the panel decision in this cause which occurred after the case was submitted and thus was not available to have been embraced within the panel decision which was filed December 15, 1983. As stated in the Supplemental Suggestion, Petition For Rehearing, and Request For

hearing En Banc, Introduction, the panel Opinion now contains a conflict in law which was not directly addressed in the Opinion, or, if addressed, now so construes an earlier decision of this Circuit and the recent Supreme Court opinion in conflict with the panel decision, so that counsel could, as the below signed has, in said Supplemental Suggestion, Petition For Rehearing, and Request for Hearing En Banc, certified as to his judgment that now one or more of the three conditions described by this Court as to the purposes of rehearing do now exist.

In light of this background, Appellees respectfully move that the Supplemental Suggestion, Petition For Rehearing, and Request For Hearing En Banc, be late filed and the time enlarged for filing same.

RESPECTFULLY SUBMITTED this 3rd day

of February, 1984.

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APPENDIX N

Order of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskelley; John Evans; Donna Boe; Wayne Ellis; and The City of Pocatello, an Idaho Municipal Corporation, No. 82-3258, filed Feb. 7, 1984, that a majority of the panel had voted to reject the suggestion for rehearing en banc.

. . . N-1 through N-2.

(Reference: Petition for Writ of Certiorari, at pp. 4, 24, 25, and 60.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs-Appellants, vs. C.G. BILLMEYER; MELVIN MORGAN; F.W. "BILL" ROSKELLEY; JOHN EVANS; DONNA BOE; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho Municipal Corporation, Defendants-Appellees.	NO. 82-3258 (Idaho) ORDER

Before: GOODWIN, WALLACE, and REINHARDT, Circuit Judges

A majority of the panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P.

35(b).

The suggestion for rehearing en banc is rejected.

APPENDIX O

Order of United States Court of Appeals, Ninth Circuit, in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer; Melvin Morgan; F.W. "Bill" Roskeller (sic); John Evans; Donna Roe (sic); Wayne Ellis; and The City of Pocatello, an Idaho Municipal Corporation, No. 82-3258, filed Feb. 21, 1984, denying Appellees' Motion To Enlarge The Time For Filing And To Late File The Supplemental Suggestion, Petition for Rehearing, and Request For Hearing En Banc.

(Reference: Petition for Writ of Certiorari, at p. 5, 25, and 60.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs-Appellants, vs. C.G. BILLMEYER; MELVIN MORGAN; F.W. "BILL" ROSKELLER; JOHN EVANS; DONNA ROE; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho Municipal Corporation, Defendants-Appellees.	NO. 82-3258 (Idaho) ORDER

Before: GOODWIN, WALLACE, and REINHARDT, Circuit Judges

Appellees' Motion to Enlarge the Time for Filing and To Late File the Supplemental Suggestion, Petition for Rehearing, and Request for Hearing En Banc is DENIED.

APPENDIX P

United States Constitution

First Amendment

Fourteenth Amendment

Article IV, §1

United States Code

28 U.S.C., §1738

42 U.S.C., §1983

Federal Rules of Appellate Procedure

Rule 35

Rule 40

Idaho Code

§67-6519

§67-5215

§67-5216

(Reference: Petition for Writ of Certiorari, at p. 5)

AMENDMENT 1

[Religious and political freedom.] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 14

Section 1. [Citizenship - Due process of law - Equal protection.]
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE IV

STATE AND TERRITORIAL RELATIONS

Section 1. [Full faith and credit to records and judicial proceedings of states.]

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 USCS §1738

§1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

/// /// ///

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646, §1, 62 Stat. 947.)

42 USCS §1983

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Dec. 29, 1979, P. L. 96-170, §1, 93 Stat. 1284.)

Federal Rules of Appellate Procedure

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence

of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages. (Amended Apr. 30, 1979, effective Aug. 1, 1979.)

Federal Rules of Appellate Procedure

Rule 35. Determination of Causes by the Court In Banc.

(a) When Hearing or Rehearing in Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing In Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any

such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion does not Stay Mandate. If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of

such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(Amended Apr. 30, 1979, effective Aug. 1, 1979.)

Idaho Code § 67-6519

See Petition for Writ of Certiorari at page 14

Idaho Code § 67-5215

See Petition for Writ of Certiorari at page 14

Idaho Code § 67-5216

See Petition for Writ of Certiorari at page 15

Supreme Court, U.S.
FILED
AUG 13 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2041

IN THE SUPREME COURT OF THE UNITED STATES

C.G. BILLMEYER, MELVIN MORGAN, F.W. "BILL" ROSKELLEY, JOHN EVANS, DONNA BOE, WAYNE ELLIS, and the CITY OF POCATELLO, an Idaho Municipal Corporation,

Petitioners,

vs.

JOSEPH TOVAR and DEBORAH ANN MOORE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 83-2041

IN THE SUPREME COURT OF THE UNITED STATES

C.G. BILLMEYER, MELVIN MORGAN, F.W. "BILL" ROSKELLEY, JOHN EVANS, DONNA BOE, WAYNE ELLIS, and the CITY OF POCATELLO, an Idaho Municipal Corporation,

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QUESTIONS PRESENTED

1. Whether or Not this Court Should Exercise Jurisdiction to Grant the Petition for Writ of Certiorari in Light of Petitioners' Failure to Make Timely Application.

2. Whether or Not Respondents' Claims Pursuant to 42 U.S.C. §1983 Can Be Heard When Those Claims Were Reserved by Respondents at the Time of Pursuing a State Court Action.

3. Whether the District Court's Granting of Petitioners' Motion for Summary Judgment was Proper in Light of Facts Demonstrating Unconstitutional Motivation.

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement of the Case	1
Summary of Arguments	3
Reasons for Denying the Petition	7
Argument One	
This Court Should Deny The Petition As Being Jurisdictionally Out Of Time Pursuant To Rules Of The Supreme Court	7
Argument Two	
Respondents Properly Preserved Their Federal Rights In Federal Court And Must Be Allowed To Litigate Those Rights In The Federal District Court	21
Argument Three	
The Court Of Appeals Properly Relied Upon And Applied The Decision In Ebel v. City of Corona	38
Conclusion	40
Appendix "Q"	
Appendix "R"	

TABLE OF AUTHORITIES

CASES

Allen v. McCurry, 449 U.S. 90 (1980)	35,36
Cipriano v. City of Houma, 395 U.S. 701 (1969)	30
Ebel v. City of Corona, 698 F.2d 340 (9th Cir., 1983)	6,38,39, 40
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)	35
Fair Assessment in Real Estate Ass'n. v. McNary, 454 U.S. 100, 112 (1981)	27
Federal Trade Comm. v. Colgate-Palmolive Company, et al., 380 U.S. 374 (1965)	19
Federal Trade Comm. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952)	19
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	28,32
Juidice v. Vail, 430 U.S. 327 (1977)	28
Juncker v. Tinney, 549 F.Supp. 574 (D.C. Md., 1982)	37
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)	5,26,28, 31,32, 33

Migra v. Warren City School Dist. Bd. of Ed., ____ U.S. ____, 79 L.Ed.2d 56 (1984)	34,35
Moore v. Sims, 442 U.S. 415 (1979)	29
Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)	24,25, 26
Parratt v. Taylor, 451 U.S. 527 (1981)	36,37
Railroad Comm'n. of Texas v. Pullman, 312 U.S. 496 (1941)	1,2,5, 24,25, 29
Scoggin v. Schrunk, 552 F.2d 436 (9th Cir., 1975)	35,36
Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (S.Ct., 1978)	22
Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1979)	2,18, 24
Tovar v. Billmeyer, 1721 F.2d 1260 (9th Cir., 1983)	3
Trainor v. Hernandez, 431 U.S. 434 (1977)	28
U.S. v. Zirpolo, 450 F.2d 424 (3rd Cir., 1971)	31
Vicory v. Walton, 721 F.2d 1062 (6th Cir., 1983)	37,38
Village of Belle Terre v. Borras, 416 U.S. 1 (1974)	38

Young v. American Mini-Theaters, 427 U.S. 50 (1976) 38

Younger v. Harris, 401 U.S. 37 (1971) 24,26, 27,28, 29,30,31

STATUTORY PROVISIONS AND RULES

28 U.S.C. §2102 11,18,19

42 U.S.C. §1983 5

20 Am. Jur. 2d, §233 31

Rules of the Supreme Court

Rule 17 7
Rule 20 8,10,11
Rule 21 20
Rule 29 11
Rule 33 20

Ninth Circuit Court of Appeals Rules 13

Federal Rules of Appellate Procedure

Rule 35 12
Rule 40 12,13,14

Vol. II, Federal Procedure, Lawyer's Edition §3:751 13

Stern & Gressman, Supreme Court Practice, 5th Ed., §6.3 15,16

STATEMENT OF CASE

In the Petition for Writ of Certiorari, Petitioners set forth the factual and procedural history of this case. However, there are additional facts which will be helpful in the consideration of Petitioners' arguments.

On April 12, 1976, the United States District Court entered an Order granting a Motion to Abstain. See Appendix Q-1, et seq., Memorandum decision of Judge J. Blaine Anderson, United States District Judge. As indicated in that Memorandum, and not disputed by Petitioners, the Respondents filed a Reservation of Rights in state court. This Reservation of Rights and the District Court's reliance upon Railroad Comm'n. of Texas v. Pullman, 312 U.S. 496 (1941) reserved for Respondents the right to return to federal court on questions of federal law after the state

court had the opportunity to rule on state claims. Appendix Q-1, et seq. See also Appendix J, Petitioners' Petition, at J-4.

In 1979, upon the first consideration of this case, the United States Court of Appeals for the Ninth Circuit upheld Respondents' right to reserve federal questions and recognized the validity of federal abstention under Pullman. Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1979).

The Court of Appeals for the Ninth Circuit based its reversal of the District Court's Order granting Petitioners' Motion for Summary Judgment upon the following facts: the primary purpose of the City Council's zoning decision was to prevent Respondents' adult theater from operating in Pocatello; the building inspector was ordered by the Mayor to deny the building permit; no other City Council meeting had ever been held to deny a building permit

prior to the submission of an application; and finally, the new interpretation given to the City's zoning code in light of the above facts. Tovar v. Billmeyer, 721 F.2d 1260 (9th Cir., 1983). Appendix K, Petitioners' Petition, K-13-16.

The remaining facts necessary to resolve this Petition are adequately set forth in Petitioners' Petition.

SUMMARY OF ARGUMENTS

I.

A Petition for Writ of Certiorari must be brought within ninety days of the date of decision and order of the Court of Appeals. This rule is only modified where a timely Petition for Rehearing is filed. Petitioners failed to timely file a Petition for Rehearing and did not file their Petition for Writ of Certiorari within the ninety day time period between

the date of judgment and the expiration date for filing the Petition.

Furthermore, Petitioners did not file a Petition for Writ of Certiorari from the first decision of the Ninth Circuit Court of Appeals in 1979 and because that decision resolved issues unrelated to the second appeal and decision, this Court cannot reopen the questions decided therein. The first appeal decided the questions of abstention and reservation of federal claims.

Petitioners have also failed to indicate a conflict between any decision of this Court and the results reached below. Respondents at all times reserved their right to proceed in federal court on their federal claims. This reservation of rights was recognized by both the Federal District Judge and the Ninth Circuit Court of Appeals. The Respondents did not seek to

enjoin or otherwise interfere with any state proceeding. Therefore, the courts below properly applied the Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941), abstention doctrine, allowing Respondents to first litigate claims in state court and then proceed in federal court on the federal claims.

It would be inequitable for this Court to retroactively apply a new procedural standard in Respondents' case, as Respondents relied upon the previous procedural rules and findings of the courts in question. Additionally, abstention under Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982), is also not required because two of the four prongs of the test are not met in this case.

Respondents are entitled to bring their §1983 claims in federal court because

they specifically reserved those claims in the state proceedings. Respondents' §1983 claims state a cause of action as they concern an infringement of a fundamental right unrelated to due process.

Finally, the Ninth Circuit Court of Appeals properly applied the Ebel v. City of Ccrona, 698 F.2d 340 (9th Cir., 1983), rule to this case as zoning procedures and regulations are subject to constitutional scrutiny.

REASONS FOR DENYING THE PETITION

A review on Writ of Certiorari is not a matter of right, but of judicial discretion. As indicated in Rule 17, Rules of the Supreme Court, it will be granted "only when there are special and important reasons therefor." Rule 17, Rules of the Supreme Court. The Petitioners have failed to indicate any special or important reasons as to why this Court should grant their Petition.

I

THIS COURT SHOULD DENY THE PETITION AS BEING JURISDICTIONALLY OUT OF TIME PURSUANT TO RULES OF THE SUPREME COURT.

A.

THE PETITION FOR WRIT OF CERTIORARI WAS FILED AFTER THE EXPIRATION OF THE APPLICABLE TIME LIMITS FOR FILING A PETITION FOLLOWING THE DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ISSUED ON DECEMBER 15, 1983.

As indicated in the Petition in this case, on May 4, 1984, Associate Justice W. H. Rehnquist signed an Order extending the time for filing a Petition for Writ of Certiorari to and including June 11, 1984, reserving for the Court's later consideration the question of whether the time for filing the Petition for Writ of Certiorari ran from the Order of the United States Court of Appeals for the Ninth Circuit on February 7, 1984, or from the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit dated December 15, 1983. An analysis of the applicable rules and facts in this case indicate that the time limitations ran from December 15, 1983, and therefore, the Petition was filed jurisdictionally out of time and cannot be considered pursuant to Rule 20.3 of the Rules of the Supreme Court.

The opinion and decision upon which this Petition for Writ of Certiorari is based was entered December 15, 1983, by the Court of Appeals for the Ninth Circuit. See Appendix J, Petitioners' Petition. Petitioners filed a "Suggestion for En Banc Consideration" on or about December 22, 1983. See Appendix M-1, Petitioners' Petition. On January 31, 1984, Petitioners filed a "Supplemental Suggestion, Petition for Rehearing, and Request for Hearing En Banc". See Appendix M-2, Petitioners' Petition. Subsequently, on February 3, 1984, Petitioners filed their "Motion to Enlarge the Time for Filing and to Late File the Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc". See Appendix M-3, Petitioners' Petition. The Court of Appeals on February 7, 1984, issued an Order denying Petitioners' December 22, 1983, Suggestion

for En Banc Consideration. See Appendix N, Petitioners' Petition. On February 21, 1984, the United States Court of Appeals for the Ninth Circuit denied Petitioners' Motion to Enlarge the Time for Filing and to Late File Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc. See Appendix O, Petitioners' Petition. The Court of Appeals did not consider Petitioners' January 31, 1984, Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc.

Rule 20 of the Rules of the Supreme Court establishes the time for petitioning for review on certiorari. Subdivision 20.4 of that rule indicates:

> "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent

> under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing a petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or on the entry of a subsequent judgment entered on the rehearing." Rule 20.4, Rules of the Supreme Court. (emphasis added)

In this case, the applicable time limit for filing the Petition for Writ of Certiorari is ninety (90) days. See Rule 20.2, Rules of the Supreme Court; 28 U.S.C. §2101(c). Any application for extension of time in which to file a Petition for Writ of Certiorari, besides setting forth the specific reasons why extension of time should be granted, must be applied for at least ten days before the specified final filing date. See Rules 20.6 and 29, Rules of the Supreme Court. Petitioners maintain their Writ of Certiorari was timely by

starting the ninety day limit on the date the appellate court denied their "Suggestion for En Banc Consideration" by asserting that such Suggestion was equivalent to a Petition for Rehearing. However, such assertion cannot stand in light of the Federal Rules of Appellate Procedure.

Under the Federal Rules, there is a clear distinction between a Petition for Rehearing and a Suggestion for a Rehearing En Banc. Rule 35 of the Federal Rules of Appellate Procedure provides in pertinent part:

> "A suggestion for a rehearing en banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not effect the finality of the judgment of the Court of Appeals or stay the issuance of the mandate." Rule

35(c), Federal Rules of Appellate Procedure. See also Vol. II, Lawyer's Edition, §3:751.

Rule 12 of the Ninth Circuit Court of Appeals Rules requires if one desires to combine a suggestion of rehearing en banc with a petition for rehearing, that reference must be made to both the suggestion for rehearing en banc as well as the petition for rehearing on the cover of the combined petition and suggestion. Rule 12, Ninth Circuit Court of Appeals Rules, Appendix R.

Petitioners' Suggestion for En Banc Consideration filed on December 22, 1983, is just that and not a Petition for Rehearing. It does not comply with Rule 12 set forth above. See Appendix M-1, Petitioners' Petition. Furthermore, it does not satisfy the Rule 40 requirements for a Petition for Rehearing. In fact,

Petitioners filed their suggestion pursuant to Rule 35 and not Rule 40 of the Federal Rules of Appellate Procedure. A review of the record pertaining to the first appeal to the Ninth Circuit in this case, which occurred in the fall of 1979, indicates that the Petitioners in this case understood the requirements of the rules by filing the appropriate Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc concerning the first appeal.

Therefore, the filing by Petitioners of a Suggestion for En Banc Consideration on December 22, 1983, does not constitute the filing of a Petition for Rehearing and had no effect on the applicable time limits.

A Petition for Rehearing must be filed fourteen days after entry of judgment. Rule 40(a), Federal Rules of Appellate

Procedure. The Petitioners' "Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc" was filed on January 31, 1984, well after the expiration of the fourteen day time limit. On February 3, 1984, Petitioners attempted to cure their late filing of the Petition for Rehearing by filing a "Motion to Enlarge the Time for Filing and to Late File Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc". See Appendix M-3, Petitioners' Petition. The Court of Appeals for the Ninth Circuit denied Petitioners' Motion to Late File. Appendix O, Petitioners' Petition.

Petitioners cite to Stern & Gressman, Supreme Court Practice, 5th Ed., §6.3, pps. 398-400, to support the proposition that the time limits for filing the Petition for Writ of Certiorari began on February 7, 1984. However, that reliance is based upon

the incorrect assumption that the Suggestion for En Banc Consideration constituted a Petition for Rehearing. Stern & Gressman specifically indicate that a denial of a Motion for Leave to File a Petition for Rehearing Out of Time does not extend the time for filing appeals. Stern & Gressman, Supreme Court Practice, 5th Ed., §6.3, p. 399. The fact that the Court of Appeals intended to deny Petitioners' Application to Late File their Petition for Rehearing is further buttressed by the fact that the Court of Appeals did not to consider the January 31, 1984, Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc.

The Petitioners did not file a Petition for Rehearing within fourteen days from the date of judgment. The Court of Appeals denied Petitioners' Motion to Enlarge the Time for Filing and to Late

File Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc. Because a Petition for Rehearing was not filed within the first fourteen days following judgment, Petitioners' time limit for filing a Petition for Writ of Certiorari must be computed from the date judgment was entered. That date is December 15, 1983. Pursuant to the applicable rules, Petitioners were required to file their Petition for Writ of Certiorari by March 14, 1984, or request an extension of time to file that petition on or before March 4, 1984. Petitioners failed to comply with either time limit and, thus, their Petition for Writ of Certiorari should not be accepted by the Court.

B.

THIS COURT SHOULD NOT REOPEN ISSUES DECIDED IN THE FIRST APPEAL TO THE UNITED

STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT WHICH WERE
DECIDED ON NOVEMBER 6, 1979.

Petitioners failed to file a Petition for Writ of Certiorari from the Opinion of the United States Court of Appeals for the Ninth Circuit dated November 6, 1979. Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1979). That Opinion dealt with the question of abstention and the ability of Respondents to assert their §1983 claims in federal court. The questions raised and decided in that appeal were not affected by the subsequent decision by the United States Court of Appeals for the Ninth Circuit dated December 15, 1983. Therefore, even if this Court feels that the Petitioners did not violate the time limits discussed above, the Petition must be limited to a consideration of only those issues which were discussed and decided by the United States Court of Appeals in its

second decision. See Federal Trade Comm'n. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952); Federal Trade Comm'n. v. Colgate-Palmolive Company, et al., 380 U.S. 374 (1965).

Thus, all issues in this Petition for Writ of Certiorari pertaining to abstention or the question of the ability of federal courts to entertain the §1983 action relate to the first appeal, and since the subsequent appellate decision did not have any affect on that first appeal, this Court should refuse to entertain any questions or issues relating to the propriety of the District Court deciding the §1983 questions.

C.

THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY CONSIDERATION OF THE PETITION BECAUSE OF THE NATURE OF PETITIONERS' PETITION.

Rule 21.5 of the Rules of the Supreme Court provides that a petitioner's failure to present with accuracy, brevity, and clearness whatever is essential to the ready and accurate understanding of the points requiring consideration may be sufficient reason for denying a petition. Rule 21.5, Rules of the Supreme Court.

In this case, the questions presented in the Petition for Writ of Certiorari are unclear and the issues muddled. Additionally, Petitioners' inexplicably numbered three pages 26(a), 26(b) and 26(c), making their Petition three pages over the limitation imposed by Rule 33.3 of the Rules of the Supreme Court. Therefore, Respondents request this Court exercise its discretion and deny the Petition.

II

RESPONDENTS PROPERLY PRESERVED THEIR FEDERAL RIGHTS IN FEDERAL COURT AND MUST BE ALLOWED TO

LITIGATE THOSE RIGHTS IN THE FEDERAL DISTRICT COURT.

The Ninth Circuit Court of Appeals in an Opinion rendered December 15, 1983, remanded this case to the District Court for a trial upon the merits after finding that Respondents had properly reserved their federal claims and instructed the trial court to examine the question of whether or not there was an unconstitutional motivation underpinning the zoning decisions made in this case in violation of the First Amendment to the United States Constitution. See Appendix K, Petitioners' Petition. This issue, along with the related issues of whether or not the regulations in question are reasonable pursuant to the First Amendment protections of speech in question, does not require the interpretation or the

application of any state statutes or local ordinances.

The procedural history of this case is such that the state courts have had full opportunity to litigate various issues. Petitioners' Petition, pps. 3-25. The state courts, however, from the various decisions rendered, never directly addressed the freedom of speech claims presented by Respondents even though such questions were raised before them. See Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (S.Ct., 1978). Appendix I, Petitioners' Petition. The state courts' decisions in this case concern the general arbitrary and capricious standard of review applied in zoning cases. Respondents have at all times reserved their right to bring the federal questions, including the First Amendment question, before the federal

court. Appendix K-25, Petitioners' Petition.

The following discussion will indicate the propriety of a trial on the merits in the Federal District Court in this action as ordered by the Ninth Circuit Court of Appeals. It is Respondents' contention that this discussion is not necessary as Petitioners failed to bring a Writ of Certiorari concerning the abstention issues decided in the first appeal to the Ninth Circuit and, therefore, should be precluded from raising this argument in this Petition. However, even if the Court feels that this Petition was timely filed and that the Petition can re-open arguments settled on appeal in 1979, the following analysis indicates the Court should not grant the Writ of Certiorari.

A.

RESPONDENTS' FULL RESERVATION OF FEDERAL RIGHTS IN THE STATE PROCEEDING COMBINED WITH THE PULLMAN ABSTENTION EXERCISED AND AFFIRMED BY THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS PERMIT CONSIDERATION OF RESPONDENTS' §1983 CLAIMS IN FEDERAL DISTRICT COURT.

As stated by this Court, there are two primary types of federal abstention -- Pullman abstention and Younger abstention. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477 (1977). In this case, the District Court and Court of Appeals applied Pullman abstention by withholding judgment on Respondents' reserved federal claim until after the state courts had an opportunity to address the issues. See Appendix Q, Opinion of the District Court; Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1979); Appendix J, Petitioners' Petition. A brief discussion of the two primary doctrines of federal

abstention indicates the propriety of these decisions.

Pullman abstention involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute or procedure so as to eliminate or at least to alter materially a constitutional question presented. Railroad Comm'n v. Pullman Company, 312 U.S. 496 (1941); Hodory, supra, 431 U.S. at 477. In this case, it was possible that the state courts would decide that the statute or the procedures employed by the City Council of Pocatello were violative of a state statutory or constitutional provision which would obviate the necessity of the District Court proceeding on Respondents' federal claims. Therefore, abstention under Pullman was appropriate in order to allow the state courts an opportunity to resolve the issues.

The second type of abstention pursuant to the doctrine is Younger abstention. In Younger, the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they related to the state's interest in pursuing an on-going state proceeding, and as they involved the ability of the state courts to consider federal constitutional claims in that context. Younger v. Harris, 401 U.S. 37 (1971); Hodory, supra, 431 U.S. at 477. It is this type of abstention which Petitioners assert should have been applied in this case. See argument I, p. 29; Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). There are three independent reasons why this Court should not accept Petitioners' assertion.

1.

THE YOUNGER RATIONALE IS NOT APPLICABLE TO THE FACTS AT BAR.

While it is true that the principles of federalism recognized in Younger, supra, have not been limited to federal court interference in state criminal proceedings, they have been specifically limited in their application to federal cases which seek to enjoin state judicial proceedings; a limitation which has not been abandoned by the Court. Fair Assessment in Real Estate Ass'n. v. McNary, 454 U.S. 100, 112 (1981). It is evident, from a review of the authorities in which the Younger doctrine has been applied, that this Court has limited the application of that doctrine, even in cases involving §1983 actions, to factual situations wherein the party seeking relief in the federal courts was attempting to avoid some type of action

brought against them in state tribunals. See Middlesex County Ethics Committee, supra (attempt to avoid New Jersey state disciplinary proceedings); Younger, supra (attempt to obtain Federal Court equitable relief against prosecution in state court); Trainor v. Hernandez, 431 U.S. 434 (1977) (attempt to seek Federal intervention in pending civil enforcement suit filed in state court by welfare agency); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (attempt to obtain Federal declaratory and injunctive relief seeking to enjoin execution of a state court judgment without exhaustion of state appellate remedies); Juidice v. Vail, 430 U.S. 327 (1977) (party seeking Federal relief that had ignored state-court proceedings for a period of more than nine (9) months sought to have the statutory provisions authorizing contempts enjoined as unconstitutional);

Moore v. Sims, 442 U.S. 415 (1979) (parties sought federal court injunctive relief of state court Department of Human Resources child custody actions); McNary, supra (requested federal action which would act to enjoin state law tax collection).

Thus, Younger abstention has no application to the case at bar in that Respondents are not seeking to interfere with any state proceeding; indeed, Respondents have already exhausted all state avenues of relief.

2.

RESPONDENTS HAVE ACTED IN RELIANCE UPON THE PRIOR FINDING OF PULLMAN ABSTENTION AND APPLICATION OF YOUNGER ABSTENTION AT THIS POINT WOULD BE INEQUITABLE.

Respondents, as stated previously, reserved their right to proceed in Federal court upon Federal claims. Based upon this reservation and the Pullman abstention exercised by the District Court, the Court

of Appeals ruled in its first decision that the District Court must entertain the federal claims of Respondent. Petitioners now request, after allowing four years to elapse, that this Court fashion a new procedural rule requiring that federal courts, henceforth, apply Younger absention in similar cases. If such a rule were adopted by this Court, Respondents would be precluded from litigating their First Amendment claims by the enactment of a procedural rule which did not exist and which was not applied by the courts at the times in question.

Thus, even if this Court decides that Younger abstention is appropriate in such cases as Respondents', it should hold that its decision is non-retroactive and does not apply in Respondents' case. See Cipriano v. City of Houma, 395 U.S. 701

(1969); 20 Am. Jur. 2d, §233, p. 562; U.S. v. Zirpolo, 450 F.2d 424 (3rd Cir., 1971).

3.

YOUNGER ABSTENTION, AS SET FORTH IN MIDDLESEX IS NOT SATISFIED IN THIS CASE.

Even if this Court decides that the Younger abstention doctrine as put forth in Middlesex should generally be applied in this type of case, and even if the Court decides that such doctrine can be applied retroactively, the specific facts in this case do not satisfy the Middlesex four-part test.

Petitioners first indicate that Middlesex sets forth a four-part test. Petitioners then attempt to modify this test by claiming that only the first three parts need be met, if the provision in question is susceptible of a constitutional construction in state court. See Petitioners' Petition, pps. 40-41.

However, this reading misconstrues the language of Huffman cited on p. 40 of Petitioners' Petition. Huffman, in the cited language, held that the District Court could intervene if it finds a state proceeding is motivated by a desire to harass or is conducted in bad faith or where the statute is flagrantly violative of express constitutional prohibitions. Huffman, supra, at 496. Petitioners attempt to assert that if one of these exceptions is not met in the case, then the fourth part of the Middlesex test is satisfied. However, it is clear that what the Court has ruled is that any one of the exceptions, if they exist, are sufficient to justify federal intervention.

Therefore, This case does not satisfy two of the four prongs of the Middlesex test. It does not satisfy the first prong which requires the existence of a state

action. There is no state action pending with which federal court action would interfere. Furthermore, if this Court orders abstention at this juncture, Respondents would be precluded from seeking relief in any tribunal.

This case does not meet the fourth part of the test as the Ninth Circuit Court of Appeals has already held that the facts on record indicate that there is evidence of unconstitutional bad faith. See Appendix K, Petitioners' Petition, K-18-25. This evidence renders abstention inappropriate. Therefore, because two of the four parts of the Middlesex test are not satisfied in this case, abstention under that doctrine is inappropriate and there is no error in the decision of the Court of Appeals.

B.

RESPONDENTS ARE ENTITLED TO BRING THEIR §1983 ISSUES IN FEDERAL COURT.

Petitioners urge that this Court's recent decision in Migra v. Warren City School Dist. Bd. of Ed., ____ U.S. ____, 79 L.Ed.2d 56 (1984) requires this Court to hold that Respondents are precluded from raising any issues which were or could have been raised in the state court proceeding. However, Petitioners' assertion is not valid as Respondents reserved their federal rights and were informed by both the Federal District Court and the Court of Appeals for the Ninth Circuit that such Federal rights had been reserved. See Appendix Q; Appendix K, Petitioners' Petition.

The significance of this reservation in relation to the Migra decision is evident when one considers footnote 7 of

that decision which states in pertinent part:

> "In the event that a §1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)." Migra, supra, 79 L.Ed.2d at 64.

Respondents have performed the exact steps which this Court in Migra said were required to be performed in order to preserve a party's ability to raise §1983 claims in federal court after first proceeding in state court.

Petitioners' reliance upon Allen v. McCurry, 449 U.S. 90 (1980) and Scoggin v.

Schrunk, 522 F.2d 436 (9th Cir., 1975) is similarly misplaced. In Allen, the Court specifically noted the exception to the preclusion rule when a party reserves its right to proceed in federal court on federal issues. See Allen, supra, 449 U.S. at 102, footnote 17. Scoggin likewise did not involve a case where the party seeking relief had previously reserved the right to proceed in federal court on federal issues.

This doctrine of issue preservation and its effect on preclusion was applied by the Court of Appeals for the Ninth Circuit in its second decision at footnote 8. See Appendix K, Petitioners' Petition at K-25. Therefore, because Respondents reserved their right to proceed in federal court on federal questions, they are entitled to do so at this time.

Petitioners also assert that this Court's decision in Parratt v. Taylor, 451

U.S. 527 (1981), requires a finding that Respondents' §1983 action fails to state a claim upon which relief can be based. However, Petitioners have misapplied the Parratt decision.

In Parratt, this Court set forth three prerequisites which must be met in order to bring due process claims under §1983. Parratt, supra, 451 U.S. at 536. If the complaint states a claim under §1983 based upon any constitutional or statutory provision other than the due process clause of the Fourteenth Amendment, a claim under §1983 and the Parratt requirements do not have to be met. Juncker v. Tinney, 549 F.Supp. 574, 582 (D.C. Md., 1982). Because Respondents' claim is based upon a First Amendment violation and not due process, Parratt and Petitioners' analysis do not apply in this case. Petitioners' reliance upon Vicory v. Walton, 721 F.2d 1062 (6th

Cir., 1983) is also subject to the same limitation as Vicory concerned a claim of denial of procedural due process. Vicory, supra, 721 F.2d at 1065.

III

THE COURT OF APPEALS PROPERLY RELIED UPON AND APPLIED THE DECISION IN EBEL V. CITY OF CORONA.

Petitioners assert that the Court of Appeals lacked jurisdiction over the subject matter to inquire into the motivation of the City Council in enacting zoning legislation. See Petitioners' Petition, pps. 61-63. However, the Court has long analyzed zoning regulations and their effect on fundamental rights such as those under the First Amendment. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Young v. American Mini-Theaters, 427 U.S. 50 (1976).

Even if this Court is inclined to agree with the concurring opinion of Circuit Judge Wallace that the "real purpose" test of Ebel should be applied as opposed to "a motivating factor test", the decision of the Court of Appeals must still be upheld as Judge Wallace agreed, even under his standard, that the facts precluded granting summary judgment. See Appendix K, Petitioners' Petition, K-26-27.

The Petitioners assert that the factual record indicates that all the official proceedings, including the meetings of the City Council, were fair on their face. Petitioners' Petition, p. 62. However, as found by the Court of Appeals for the Ninth Circuit, there exist numerous facts which would indicate that the zoning restriction in this case unconstitutionally violates the First Amendment. See Appendix K, Petitioners' Petition, pps. 18-25.

CONCLUSION

Petitioners have failed to timely file their Petition for Writ of Certiorari. Petitioners have also failed to indicate any conflict between the decisions reached in this case and any decision of this Court or other Federal Courts. Finally, Petitioners have not demonstrated error in the Court of Appeals application of the Ebel standard of review. Therefore, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

DATED this 10th day of August, 1984.

STOMPOLY & EVEN, P.C.

By _____
William G. Walker
Attorneys for Respondents

APPENDIX "Q"

Memorandum decision in the United States District Court for the District of Idaho in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Wayne Ellis, and The City of Pocatello, an Idaho municipal corporation, Civil No. 4-75-59, April 13, 1976.

. . . Q-1 through Q-14.

(Reference: See Brief in Opposition to Petition for a Writ of Certiorari at page 1.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs,	)	Civil No. 4-75-59
vs.	)	M E M O R A N D U M
C.G. BILLMEYER; MELVIN MORGAN; F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation, Defendants.	)	

This action is presently before the Court on defendants' motions to dismiss and to abstain, filed on January 20, 1976, by each of the nine named defendants. As the motions filed are, in most respects, identical, they will be treated as one motion. The parties have filed original briefs and a reply brief has been filed by the defendants and the matter is submitted.

On December 22, 1975, the present action was filed in this Court under 42 U.S.C. §1983 seeking injunctive relief, declaratory relief and damages. The plaintiffs' prayer for relief asks this Court to declare the zoning ordinance of the City of Pocatello and its provisions as unconstitutional on its face and as applied, to declare invalid the City Council's October 23, 1975, hearing and decision, to reinstate the Board of Adjustment's decision, to enjoin the defendants from initiating any action contesting that the plaintiffs' proposed use is not in accordance or contrary to the zoning ordinance, a judgment for lost profits, attorneys' fees and punitive damages.

Concurrently, there was filed on December 9, 1975, in the Sixth Judicial District of Idaho, an action by one of the present plaintiffs, Deborah Ann Moore,

entitled Petition to Review Denial of Variance. Named as defendants were eight of the nine present defendants, with the exception of defendant Wayne Ellis. On February 11, 1976, the Honorable George W. Hargraves issued his Memorandum Decision and Order which reversed the City Council's decision of October 23, 1975, and remanded the matter back to the City Council for further proceedings and consideration in conformity with his Order. That is presently the status of the state court action.

Both of these actions arise out of the same following factual background. In September, 1975, plaintiffs purchased certain property, on which they sought to house their proposed adult bookstore and theater. On October 8, 1975, plaintiffs' application for a conditional use permit was approved by the Board of Adjustment for the City of Pocatello. On October 9,

1975, an appeal from that decision was taken by the Downtown Merchants Association to the City Council. On October 23, 1975, the City Council held a hearing to review that decision, which resulted in a reversal of the Board of Adjustment's decision and the Council refused to issue to plaintiffs a conditional use permit for the operation of their theater. Whereupon, the two above actions were filed.

At the outset, we are mindful that when the exercise of authority by state officials is attacked, federal courts must be constantly aware of the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of it own law." Stefanelli v. Minard, 342 U.S. 117, 120, 72 S.Ct. 118, 96 L.Ed. 138 (1951). Also, this Court must recognize that ours is a system in which "the National Government, anxious though it may be to vindicate and

and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), quoted in Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

With this background, we must scrutinize plaintiffs' state court complaint and the present complaint to determine if it is proper for this Court to stay its hand in deference to the state court so as not to "unduly interfere" with the state court action.

The declaratory relief sought by the present plaintiffs has, at least in part, been remedied by the state court. That court has already reversed the October 23, 1975, decision of the City Council, thereby reinstating the Board of Adjustment's decision which mandates as unwarranted

any declaration by this Court to that effect. Similarly, it would appear unwise for this Court to prematurely declare the zoning ordinance under which any conditional use permit may be granted as unconstitutional. This is so because the state matter is on remand to the City Council, and, while this Court cannot prognosticate what action will be taken, certainly, the City Council may reverse itself and issue the desired conditional use permit to the plaintiffs. Likewise, if the City Council does not change its position, the very able state court judge may determine that the ordinance is unconstitutional. Thus there are questions of state law that may dispose of the necessity for this Court to decide constitutional questions. Railroad Commission of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Additionally, as zoning is particularly of local concern,

this Court would be interfering with the administration by a state of its own affairs if this Court were to grant the declaratory relief sought. As the Supreme Court stated in Alabama Public Service Comm. v. Southern R. Co., 341 U.S. 341, 349, 71 S.Ct. 762, 95 L.Ed. 1002 (1951):

> "As adequate state court review of an administrative order based upon predominately local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights." 1/

The present plaintiffs also seek to enjoin the defendants from instituting any action challenging plaintiffs' use as being contrary to the City's zoning ordinance. It has been held in Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), that actions under 42 U.S.C. §1983 are within the expressly authorized exceptions to the anti-injunction statute, 28 U.S.C. §2283. The granting of such injunctions, to be proper, must be within the

certain exceptional circumstances laid down in Younger, supra. One such circumstance is where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." Younger, supra, 401 U.S. at 54. The present plaintiffs have alleged bad faith harassment on the part of the defendants. The injunction plaintiffs seek is for future actions. The question then becomes whether any perceived threat to plaintiffs is sufficiently real and immediate to show an existing controversy. It appears that plaintiffs are merely anticipating the filing of future actions and have presented no evidence in the record other than their allegations to establish such a real threat. See, Gregory v. Gaffney, 322 F.Supp. 238 (D.C. N.C. 1971).

Additionally, there is another reason why this Court should stay its hand in granting any injunctive relief. As the

Supreme Court in Mitchum stated:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."
> 407 U.S. at 243.

For this Court to enjoin prematurely the actions of these defendants would be to deny them the effective administration of their duties and be at serious odds with the notions of comity and federalism.

The remaining claims by the plaintiffs are those seeking money damages sounding in tort and also money damages by virtue of the alleged bad faith harassment pursuant to 42 U.S.C. §1983. Clearly, the state courts have concurrent jurisdiction over civil rights cases. Long v. District of Columbia, 469 F.2d 927 (D.C. Cir. 1972). Therefore, the present §1983 claims arising out of a common nucleus of operative fact could have been brought in state court. Again, the notions of comity and

federalism would dictate that this Court stay its hand and let the state court render its decision. For the same reasons, plaintiffs' claims sounding in tort which seek to invoke the pendent jurisdiction of this Court must also submit to the notions of comity and federalism.

It should be noted that plaintiffs, by their state court counsel, have filed a Reservation of Constitutional Questions in that state action. This was notice filed on February 2, 1976, pursuant to the authority of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). It would appear from a reading of England that the notice filed was premature. England held that if a litigant in federal court is remitted to a state court under the doctrine of abstention, he may preserve his right to return to federal court by refusing to litigate his federal conten-

tions in state court. (My emphasis). In England the parties first filed their action in federal court and a three-judge court abstained, allowing the state courts an opportunity to determine the issues presented, which is just the opposite situation here in the present case.

For this reason, it would be proper for this Court to retain jurisdiction but to stay its hand pending determination of the issues in state court. The notice of reservation was not filed until nearly two months after the initiation of the state court action and almost a month and a half after the filing of this action. Having chosen the state court forum initially, this reservation only secures for plaintiff his right to return to federal court should the state court not resolve the federal questions to his satisfaction. Clearly, this notice does not prevent this Court from exercising its discretion to await

determination by a state court when the principles of comity and federalism apply.

In conclusion, there does not appear to be any compelling reason why this Court should not observe the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." Stefanelli, supra. The litigants have chosen the state court forum initially where there is available full remedy for all of their rights and the same factual background is before that forum. For this Court to proceed and make a determination on the merits would have the possibility of issuing conflicting decisions which would thereby defeat the principles of comity and federalism.

Accordingly,

IT IS HEREBY ORDERED that the defendants' motions to dismiss are DENIED and the defendants' motions to abstain are GRANTED.

IT IS FURTHER ORDERED that this matter will be held in abeyance pending further proceedings in the state district court. Counsel for the parties will keep this Court advised periodically as to the progress of those proceedings.

DATED this 12th day of April, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

FOOTNOTES

1/ While this action involved an injunction against enforcement of a statute which has not been sought in the instant case, the underlying notions of comity are relevant.

APPENDIX "R"

Rule 12. Suggestion of Appropriateness of Rehearing En Banc

Where a suggestion of the appropriateness of a rehearing en banc, made pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is made as part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion; and unless this is done the court shall not be required to consider such suggestion. (As amended June 9, 1971; March 1, 1979; October 1, 1981.)

(Reference: Federal Procedure L. Ed., Appeal, Certiorari, and Review, §3:750.)